

**INEQUALITY, ABUSE, SUPERVISION, OF THE CONTRACT OF RESIDENTIAL
LEASE IN SOUTH AFRICA**

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Declaration of originality by candidate

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Summary

This dissertation seeks to investigate and evaluate the inequality, abuse and supervision of the contract of residential lease in South Africa. It also attempts to answer three main questions: Whether the contract of residential lease is reeked with abuse of unequal bargaining power between the lessor and lessee? What protective measures are available in terms of legislation to guard against abuse of power and inequalities? Is the current legislation or set structures of contract of lease sufficient in addressing the problems between the lessor and lessee?

The introduction is an overview of the general fundamental principles of the contract of residential lease focusing on duties of the parties within the contract. This analysis seeks to answer the following research questions; viz: What are the protective measures in legislation to guard against abuse and inequalities? Are the current regulations, supervisory measures, system, or structures of contract of lease sufficient in addressing the problems between the lessor and lessee? In attempting to answer the above questions I focused on the legislation regulating residential lease contract in South Africa. These are the Consumer Protection Act (CPA) 68 of 2008; the Rental Housing Act (RHA) 50 of 1999; the Rental Housing Amendment Act (RHAA) 35 of 2014; the Prevention of Illegal Eviction from Unlawful Occupation of Land Act (PIE) 19 of 1998; the Extension of Security of Tenure Act (ESTA) 62 of 1997; and the current Constitution of the Republic of South Africa, 1996 which is the supreme law of the land. Furthermore, I assessed the involvement of the Rental Housing Tribunals (RHTs) in the residential lease disputes.

In addition, this research seeks to establish the extent to which the contract of residential lease in South Africa is reeked with abuse and inequality or unequal bargaining power between the contracting parties. To achieve this, I discussed the meaning of the terms 'abuse', 'inequality', and 'unfair practice' and 'bargaining power' of the parties. Other aspects such as extra charges, repair or improvements, rent increase, security deposit were scrutinised to establish abuse or unfair practice and bargaining powers of the parties. Finally, a conclusion was drawn up and few suggestions or recommendations were provided on what South African legislators or set structures can do to prevent or regulate abuse, inequality and unfair practice within the contract of residential lease. The research has shown that abuse or

unfair practice exists in residential lease contract. The second conclusion established is that the existing structures and fragmented provisions are enough to deal with the problems between the lessor and lessee, but it is the monitoring or supervision which requires more resources on existing set structures. I however disagree with the exclusion of section 14 of the CPA from governing of the lease as our courts has extended the meaning of the consumer to give rights to an occupant. Courts have also indicated that there is no requirement to inform the tenant that they have 20 business days to pay rent arrears before cancellation of lease.

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I salute my mentor and coach Professor J Barnard, for guiding me throughout the construction of this analysis. I thank my mother Milca Nhunzvi and who did not get an opportunity to study but she has taught me many values regarding life. Special to mention Tinomuonga Chiroba and Barnabas Muchanyerei you are God send. I dedicate this work to Clayton Nhunzvi who passed on to glory when he was about to start tertiary education, I love you. Finally, thanks to all the Denver Staff, you contributed in various ways. Glory be to God.

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CHAPTER 1: INTRODUCTION

1.1 Background information

A contract for the letting and hiring of immovable property can be described as an agreement where one party binds himself to the temporary use or enjoyment of a specific immovable property for a fixed period paying a sum of money or rental.¹ South African law in general acknowledges three types of contract of lease² namely: letting and hiring of movable or immovable thing *locatio-conductio rei*; letting and hiring of services of an employee *locatio-conductio operis* and lastly the letting and hiring of work to be done or a thing *locatio-conductio operarum*.³ This research will focus on the letting and hiring of residential immovable property while commercial property maybe mentioned in passing in some instances where relevant. The party who authorises the provisional use and enjoyment of the immovable property is called the lessor⁴ while the party permitted to use the immovable property provisionally is called the lessee.⁵ To identify that the agreement is indeed a contract of lease, three *essentialia*⁶ must be present namely: consensus between the parties on: (a) the specified immovable property;⁷ (b) the period of the temporary lease or duration of the lease;⁸ and (c) the specified amount of money or rental.⁹ An agreement without these three terms may still be a valid contract but it cannot be a contract of lease. The business of leasing immovable property is growing and thus the need for increased attention in order to monitor the industry. From a global perspective, an example of the importance of governance and the result of insufficient monitoring is the 2007/8 Global Financial Crises (GFC) in United States of

¹ Grotius 3.19.1, Van der Linden, *Kessler v Krogman* 1908 TS 290 297.

² The terms 'lease and letting' or 'contract of lease' or 'a lease' will be used interchangeably.

³ Glover and Kerr *Kerr's Law of Sale and Lease* (2014) 329-330, hereafter referred to as Glover and Kerr (2014), Havenga P *et al General Principles of Commercial Law* (2010) 171 hereafter referred to as Havenga *et al* (2010).

⁴ The term lessor and landlord will be used interchangeably. Landlord is the owner of the dwelling being leased and it includes his authorised agent/person who is lawful possession with authority to lease or sub-lease.

⁵ Reed D C and Lehmann K *Basic Principles of Business Law* (2010) 247 hereafter referred to as Reed and Lehmann (2010), the term lease and tenant will be used interchangeably.

⁶ Essential aspects or basic terms required to determine the type of a contract.

⁷ Kopel S *Guide to Business Law* (2012) 212 hereafter referred to as Kopel S (2012), *Van der Westhuizen v Gilstonbury* 1908 TS 836. Parties must agree on a particular immovable property otherwise the contract of lease will be void

⁸ Havenga P *et al* (2010) 171.

⁹ *Jordaan NO and another v Verwey* 2002 (1) SA 643 (E).

America partly caused by the housing price bubbles.¹⁰ Mohammed 25 years' experience through the Organisation of Civic Rights made him realise that the rental housing industry in South Africa currently faces a number of issues, which will be addressed in this dissertation, and a case will be made for proper monitoring of the industry.¹¹ I concur with Mohammed that tenants are abused in several ways, abuse include: historical debts incurred for water rates on the premises not owed by the lessee; unpaid electricity or water bills which is the responsibility of the lessor or previous lessee which can result to disconnection of electricity or water supplies' ; 'unlawful lockouts or evictions of tenants and their families'; unlawful limitations to make improvements by lessee; unreasonably high rental prices; poor security measures on the premises if that is material to the specific type of lease; dirty walls or fixed gadgets not working which is the responsibility of the lessor and unlawful or unreasonable refusal to return a deposit on termination of the contract.¹²

This research will attempt to prove that the above examples amount to abuse by the lessor in a contract of lease. This necessitates a discussion on the common law right and duties of the lessor and lessee in line with recent judicial decisions and applicable legislation in South Africa.

It is my view that the lessor is sometimes superior to the lessee due to the unequal bargaining position in the relationship. However, Hutchison *et al* comments that our courts have noticed the 'necessity of doing simple justice to address inequality of bargaining power' between the lessor or supplier and lessee or consumer.¹³ The Consumer Protection Act¹⁴ (CPA) and Rental Housing Act¹⁵ (RHA) have incorporated measures to protect the tenant or consumer.¹⁶ For example, the lessee may be required to pay administrative costs while still negotiating the contract of lease. Hence, any costs in relation to a contract of lease should be paid only if the

¹⁰ Obstfeld and Rogoff "Global Imbalances and Financial Products of Common Causes" 2009 *CEPR* 14, housing bubbles simply means the increase in housing prices which was accelerated by demand and speculation in United States of America.

¹¹ Mohamed *Tenant and Landlord in South Africa* (2010) 1 hereinafter referred to as Mohamed *Tenant and Landlord* (2010).

¹² Mohamed *Tenant and Landlord* (2010) 1.

¹³ Hutchison *et al The Law of Contract in South Africa* (2017) 190 hereinafter Hutchison *et al* (2017).

¹⁴ 68 of 2008.

¹⁵ 50 of 1999.

¹⁶ Preamble of RHA, sections 4 and 5 of the RHA, S 4A and S4B of the RHAA though not yet in force, Chapter 2 and 3 of the CPA.

lessor shows proof of expenditure.¹⁷ Hutchison comment that the lessor may decide some of the terms and conditions while the lessee may just consent to such terms and conditions without having the opportunity to negotiate especially when a 'standard-form contract' is used which may result to mass contracting on terms and conditions to the other parties the lessor will be conducting business with.¹⁸ It has therefore become common practice in the rental housing industry to use standard form contracts drawn with standard terms, conditions, and does not leave much room for negotiations between parties.¹⁹ It is my view that enforcement of duties may create challenges since parties to the contract are unequal in that the lessor maintains the superior position in the relationship and there is little or no room for the tenant to negotiate terms, for example, review or increase of rent on renewal of the lease agreement. The relationship is regulated by various common law principles and written legislation such as: the Rental Housing Act²⁰ (RHA); the Rental Housing Amendment Act²¹ (RHAA); and the Rental Control Act²² (RCA), while other legislation have much influence on the relationship include the Consumer Protection Act²³ (CPA); the Prevention of Illegal Eviction from Unlawful Occupation of Land Act²⁴ (PIE); the Land Reform (Labour Tenants) Act²⁵ and the Extension of Security of Tenure Act²⁶ (ESTA) to ensure that a contract of lease comply or conforms with the above named legislation or Constitutional provisions. Under the Roman law, the lessee would acquire personal rights only, which is not the same in Roman-Dutch law and South African law.²⁷ On the completion of a contract of lease, the lessee acquires personal rights against the lessor and corresponding obligations. For example, the lessor is expected to deliver²⁸ the property to the lessee in time; not to trespass the premises during the lease of property unless authorised by tenant; repair or maintain the property and

¹⁷ S 5(3)(p) Rental Housing Act 50 of 1999, Van Eeden E and Barnard J *Consumer Protection Law in South Africa* (2018) 604, abuse and supervision of the residential lease contract will be shown in this research.

¹⁸ Hutchison *et al* (2017) 25.

¹⁹ Stoop PN "The Consumer Protection Act 68 of 2008 and Procedural fairness in Consumer Contracts" 2015 *PER* 1104 hereinafter referred to as Stoop 2015 *PER*.

²⁰ 50 of 1999.

²¹ 35 Of 2014, The Act is not yet in force.

²² 80 of 1976, The Act was abolished.

²³ 68 of 2008.

²⁴ 19 of 1998.

²⁵ 3 of 1996.

²⁶ 62 Of 1997.

²⁷ Nagel *et al* (2015) 268.

²⁸ The leased property must be at disposal or available for use, if it's a house it must be not be occupied by anyone other than the lessee and property must be in good condition.

abide by the terms and conditions. On the other hand, the lessee is expected to pay for the use of property, not to misuse the property or damage the property as well as to return the property to the lessor undamaged.²⁹ The landlord is, as a general rule, not permitted to frequently enter or visit the property or premises without the tenant's authority, because use and enjoyment should not be disturbed by the lessor himself or a third party during the time of lease.³⁰ However, the lessor may enter the premises in a reasonable manner after giving a reasonable notice to the lessee.³¹

Apart from acquiring personal rights, a lessee in South Africa gains real rights that he can assert against the entire world.³² Several case laws in South Africa recognise the principle *huur gaat voor koop* and that lessee obtains a real right in this regard.³³ The lessee's real rights will not automatically flow upon the conclusion of a contract; however, they are established by possession in a short-term lease while in a long-term lease, the lease must be registered at Deeds Office.³⁴ While in occupation, the lessee is protected for the full duration of the short lease and in case of a long lease, if there is no registration, the lessee will be protected only for the first ten years.³⁵ The rule ensures that the tenant will have continuous occupation of the sold premises.³⁶ Therefore, the effect of this real right is that the lessor's successor will not be able to eject the lessee from the premises.³⁷ The court confirmed the maxim *huur gaat voor koop* by stating that after the sale of property, the new owner takes over as lessor since the seller is no longer in the picture. It also emphasised the fact that there will not be a new contract of lease since it is just a substitution.³⁸

²⁹ Visser *et al Gibson South African Mercantile and Company Law* (2003) 173-174 hereafter referred to as Visser *et al* (2003)

³⁰ Havenga P *et al* (2010) 175.

³¹ S 4(2) of RHA.

³² Nagel *et al* (2015) 268.

³³ *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD 1314 at 1322; *Green v Griffiths* 4 SC 346at 350.

³⁴ *Metacash Seven Eleven (Pty) Ltd v Pollev Property Holding and Investment* CC 2013(4) SA 506 (GSJ).

³⁵ Nagel *et al* (2015) 268.

³⁶ Nagel *et al* (2015) 268.

³⁷ Cooper WE *Landlord and Tenant* (1994) 275 hereafter Cooper WE (1994).

³⁸ *Mignoel Properties Pty) Ltd v Kneebone* 1989 (4) 1042 (A).

The maxim does not however apply if the leased property has been expropriated;³⁹ it applies differently with regard to long and short-term leases.⁴⁰ With regard to the supervision⁴¹ of the contract, the lessor appears to be a player at the same time playing the role of the referee because he drafts the terms, conditions of the relationship, and manages the relationship as well.

Upon conclusion of the contract of lease and delivery of the property, it is correct to say that the lessee becomes the temporary possessor of the immovable property. Legislation however permits the lessor and lessee to inspect the leased residential property before the lessee occupies the premises or at the end of the lease.⁴² In *Soffiantini v Mould*⁴³ the court concluded that it amounts to trespassing if the lessor enters the leased premises without the permission of the lessee.⁴⁴ In other words, it must be subject to the tenant's right to privacy.⁴⁵

Tension (the lessor and lessee's relations deteriorate or they act in opposition) is created when the property owner relies on common law rights to remove or evict tenants from rented premises on the termination of the contract of lease or where the property owner resorts to self-help eviction, which entails the lessor removing or evicting the tenant from the leased premises forcefully without an eviction order.

The lessor is not permitted to take the law into his own hands by forcibly ejecting the lessee without a court order.⁴⁶ A lessor is not also obliged to claim rent for the duration of wrongful occupation, however, he can claim damages from the lessee.⁴⁷ Eviction of the lessee without a court order is in conflict with the constitutional housing rights of the tenant.⁴⁸ Section 26⁴⁹ recognises housing as one of the fundamental rights of human beings and it calls for new procedure to be followed during eviction. The eviction procedure are outlined in PIE⁵⁰ and

³⁹ Reed DC and Lehman K *Basic Principles of Business Law* (2010) 266 hereafter Reed and Lehman (2010).

⁴⁰ Reed and Lehman (2010) 266.

⁴¹ Refers to the regulation or governing of the residential contract of lease in terms of South African legislation.

⁴² S 5(3)(e) – (g) of RHA.

⁴³ *Soffiantini v Mould* 1956 (4) SA 150 (E).

⁴⁴ 1956 (4) 150 (E) para 243; Regardless of the reasons to enter the premises, if there is no permission the landlord will be trespassing, however there are exceptions to this rule.

⁴⁵ S 4(2) of the RHA. S 4A inserted in terms of the RHAA which is not yet in force.

⁴⁶ S 26(3) of the Constitution, 1996.

⁴⁷ Nagel *et al Commercial law* (2015) 275 hereafter referred to as Nagel *et al* (2015).

⁴⁸ S 26(1) and s 26(3) of the Constitution. The tension was also noticed in; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 (2) SA 104 (CC) para 35.

⁴⁹ Constitution of South Africa, 1996.

⁵⁰ S 4(6) and s 4(7) of the PIE.

other various legislations such as CPA,⁵¹ RHAA,⁵² and ESTA.⁵³ Relevant circumstances must be considered before eviction takes place. However, this right to evict the tenant can be restricted. It must be noted that a lessor is permitted to remove an unlawful occupier if the lease has been extinguished or terminated.⁵⁴ The legal rights of a tenant will cease on termination of lease and the tenant's occupation 'automatically becomes unlawful.'⁵⁵

Finally, this study will endeavour to consider the complexities that can be encountered in a contract of residential lease in South Africa, by confining the study focus to three key defining areas namely: inequality, abuse and supervision. Furthermore, the discussion will be restricted to the extent to which inequality, abuse and supervision are evident in a contract of lease of immovable residential property. 'Inequality' in this context will refer to inequality of bargaining powers or imbalances between the lessor and lessee. The idea is to highlight the interaction of the tenant and the property owner when they are still setting up the contract of residential lease.

This study will argue that the lessee is not given a fair chance to determine or add to the terms of the contract. In this context, 'abuse' refers to the improper conduct of the lessor within the contract of lease as he discharges his duties or abuses power or position. Any other unfair practice by the lessor contrary to the stipulations of the legislation will also amount to abuse. In simple terms, 'abuse' will also amount to the violation of rights especially by the lessor. 'Supervision' in this regard means the regulation or governing of the residential contract of lease in terms of the South African legislation and standards. Third parties such as state structures, which include the Rental Housing Tribunals (RHT's or tribunals), can do investigation or mediation when disputes are brought before them.⁵⁶

Furthermore, this investigation will also explore the effectiveness of decisions given by the tribunals in resolving disputes between the lessor and lessee. Supervision will also include the

⁵¹ S 14 of the CPA.

⁵² S 4B of the RHAA.

⁵³ S 8(1) – S 13 of the ESTA.

⁵⁴ *Maphango v Aengus Lifestyle Properties* 2011 J 19 (SCA); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2011(5) SA 19 (SCA).

⁵⁵ Glover and Kerr (2014) 435. The writer refers to *Tioppaizi v Bulawayo* 1923 AD 317 325, where the court held that contract ended due to an effluxion of time.

⁵⁶ Van Eeden and Barnard (2018) 633.

inquiry into whether the set structures are effectively enforcing the extant relevant legislation.

1.2 Research question

The purpose of this paper is to investigate related issues such as inequality,⁵⁷ abuse⁵⁸ and supervision⁵⁹ of parties in a contract of residential lease in South Africa. Furthermore, an analysis will be undertaken highlighting grey areas in South Africa's law of contract of lease of immovable property.

To sum it up, the aim of this research is therefore to consider:

1. Is a contract of residential lease in South Africa generally reeked with abuse of unequal bargaining power between the contracting parties?
2. What are the protective measures in legislation to guard against abuse and inequalities?
3. Are the current regulations, supervisory measures, system, or structures of contract of lease sufficient in addressing the problems between the lessor and lessee?

1.3 Methodology

This research will be conducted by means of a literature review. Information will be gathered from primary sources of South African Law, which include case law, legislation, and common law that will be critically discussed from transformative constitutional perspective. The secondary sources of law such as the writings of scholars in the textbooks, journals and accredited online sources will be used. In other words, a critical analysis concentrating on the contract of lease of immovable property in South Africa will be conducted.

⁵⁷ Inequality refers to inequality of bargaining powers or imbalances between the landlord and the tenant.

⁵⁸ Abuse refers to the improper conduct of the parties within the contract of residential lease as they discharge their rights and obligations.

⁵⁹ See note 33 *supra*.

1.4 Structure

Introduction will state the problem, discussion of the general fundamental principles of the contract of lease and common law duties of lessor.

Chapter 2 is termed supervision of the residential lease agreement and applicable legislation. This chapter will discuss the effects or impact of Consumer Protection Act,⁶⁰ (CPA), Rental Housing Act,⁶¹ Rental Control Act,⁶² Social Housing Act,⁶³ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act⁶⁴ and other legislation as they relate to supervision of the residential contract of lease of immovable property in South Africa. The chapter will attempt to analyse how the set structures such Rental Housing Tribunals supervise and resolve the disputes between the lessor and lessee.

Chapter 3 is titled inequality and abuse of rights of lessor and lessee. This chapter will look at the common law and the appropriate legislation with regard to contract of lease of immovable property to investigate inequality and abuse or violation of rights of a lessor and lessee. The offenses and penalties will also be interrogated to know whether there is inequality and abuse in supervision of the above named contract in South Africa.

Chapter 4 is the conclusion. This chapter will briefly give an overview of the previously discussed legislation with the case law in South Africa. The legislation and case laws of previous chapters will therefore be scrutinised from the prism of the South African law. Lastly, suggestions and recommendations will be made. The conclusion will confirm if the research questions were answered.

⁶⁰ 68 Of 2008.

⁶¹ 50 of 1999.

⁶² 80 of 1976.

⁶³ 16 Of 2008.

⁶⁴ 19 of 1998.

1.4 Delineations and limitations

This research will consider the aspects referred to above. It will not consider the contract of lease during distribution of the deceased estate or during business rescue of an organisation or winding up (liquidation) of the business under the Companies Act 71 of 2008 and Insolvency Act 24 of 1936. Lease within the definition of the National Credit Act⁶⁵ will not be considered since it is a lease of movables under hire purchase.⁶⁶ The general principles or requirements of contract law will however be mentioned in passing.

⁶⁵ 34 of 2005.

⁶⁶ Nagel *et al* (2015) 249.

CHAPTER 2: SUPERVISION OF RESIDENTIAL LEASE AGREEMENT AND APPLICABLE LEGISLATION

2.1 Introduction

This chapter seeks to investigate how the supervision or regulation of the residential contract of lease is done under the extant law in South Africa. It will investigate whether the current legislation is doing enough in terms of supervision or regulation through the set structures or systems to eliminate, eradicate or address the problems between the lessor and lessee in the contract of residential lease. Supervision in this regard means the regulation or governing of the residential contract of lease in terms of the South African legislation and standards. The current Constitution of Republic of South Africa⁶⁷, the Rental Housing Act⁶⁸ (RHA), the Rental Housing Amendment Act⁶⁹ (RHAA), the Consumer Protection Act⁷⁰ (CPA), the Prevention of Illegal Eviction from Unlawful Occupation of Land Act⁷¹ (PIE), and the Extension of Security of Tenure Act⁷² (ESTA) will be the main provisions to be discussed in this chapter.

The set structures such as the Rental Housing Tribunals will be examined to establish their effectiveness in resolving disputes between the lessor and lessee in a residential contract of lease.

Barnard comments that the RHA was promulgated to ensure adequate housing as stated also in section 26 of the Constitution, while RHAA once implemented will outline important changes to the RHA and it will 'address some of the interpretational and protective issues', PIE is applied together with the RHA to ensure 'just and equitable eviction and eviction procedures', while ESTA 'ensures statutory protection to an occupier' with agreement or 'another right in law' to be within the premises or property.⁷³

⁶⁷ The Constitution, 1996.

⁶⁸ 50 of 1999.

⁶⁹ 35 of 2014.

⁷⁰ 68 of 2008.

⁷¹ 19 of 1998.

⁷² 62 of 1997.

⁷³ Barnard J " 'For whom the bell tolls': The application of Section 14 of the Consumer Protection Act 68 of 2008 to residential lease agreements; *Transcend Residential Property Fund Limited v Mati* 2018 4 SA 515 (WCC) 2019 (82) *THRHR* 167 hereinafter referred to as Barnard J (2019) *THRHR*.

2.2 The Constitution of Republic of South Africa, 1996

The Constitution⁷⁴ protects and promotes the citizens' right to housing and it further mentions that everyone has a right to have access to adequate housing.⁷⁵ It further states that no one will be ejected from his home or have his house destroyed without a court order.⁷⁶ In other words, no law is allowed to conduct arbitrary evictions.⁷⁷ The Constitution recognises the existence of other legislation and the structures set to support such legislation. In *Maphango v Aengus Lifestyle Properties (Pty) Ltd*⁷⁸ the Constitutional Court sent back a matter concerning the legal termination of notice to the Gauteng Rental Housing Tribunal for it to adjudicate on the matter.⁷⁹ It was argued that it was the appropriate structure to deal with the matter.⁸⁰ As the common law and statutory law interact, they must promote the spirit, purport and the objects of Bill of Rights.⁸¹ The common law still has much influence on the law, but the influence is only to the extent of its consistency with the Constitution.⁸² It is preferable and vital to insert in the law of contract the constitutional values, "observe *ubuntu*, compassion, respect, team spirit and human dignity and other primary norms" as established by the courts.⁸³ When dealing with the contract of lease, equality should be valued especially in a nation like South Africa that has a background of economic inequalities.⁸⁴ Several legislation have been enacted to fulfil the constitutional mandate and achieve the right to access adequate housing in South Africa.⁸⁵ These laws include RHA, RHAA, PIE, ESTA and CPA. Finally the Constitution provides to the effect that eviction as a severe measure should not be implemented by anyone without involving the courts.⁸⁶

⁷⁴ The Constitution, 1996.

⁷⁵ S 26(a) of the Constitution.

⁷⁶ S 26(c) of the Constitution.

⁷⁷ S 26(c) of the Constitution.

⁷⁸ 2012 3 SA 531 (CC).

⁷⁹ Glover and Kerr (2014) 512.

⁸⁰ *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC).

⁸¹ *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44.

⁸² Laubscher "The impact of section 14 of Consumer Protection Act on fixed term lease agreements" 2016 *NWU* 75, hereinafter referred to as Laubscher 2016 *NWU*.

⁸³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 71; Laubscher 2016 *NWU* 76.

⁸⁴ Laubscher 2016 *NWU* 76.

⁸⁵ Laubscher 2016 *NWU* 77.

⁸⁶ Tshehla "Eviction in the Rental housing Sector in South Africa" 2016 *Speculum Juris* 30 39 hereinafter referred to as Tshehla 2016; the courts do not have a free hand to exercise this right; S 26 Constitution which states that no one maybe evicted from their home without an order from the court.

2.3 Rental Housing Act and Rental Housing Amendment Act

The key area under discussion will be the regulation or supervision of the lessor and lessee relationship under the RHA and RHAA.⁸⁷ Mohamed states that these two pieces of legislation covers even to those people staying at the backyard in a shack or garage if they are to visit the Tribunal for their complaint to be resolved.⁸⁸

A 'dwelling' is defined as 'to include any house, hostel room, hut, shack, flat, apartment, room, out-building, garage or similar structure which is leased, as well as any store-room, out-building, garage or demarcated space which is leased as part of the lease'.⁸⁹

The RHAA will include 'habitability' in its definition which is explained as a 'safe and suitable place for living'.⁹⁰ It must be noted that the RHA is applicable to leases between landlords and tenants for immovable property allocated for residential use only.⁹¹ Lease as defined by RHA it simply means an agreement finalised between lessor and lessee with regard to a dwelling for the housing purposes.⁹² The RHA explains a dwelling as "any house, hostel room, hut, shack, apartment, room, garage...."⁹³ In this regard, it is not crucial whether the landlord "acted in the course of business or not"⁹⁴ as required by the CPA.⁹⁵ Before the 1st of August 2000, lease agreements were mainly governed by the common law of South Africa.⁹⁶ Before the RHA was introduced in 1999, the Rent Control Act⁹⁷ ensured that the rent that could be burdened on certain lease property was finite or limited. The Rent Control Act⁹⁸ (RCA) placed restrictions on the amount of rent and limited grounds on which lessor could eject the lessee. The RCA had also disadvantaged the lessor in exercise of the common law rights that come with property ownership.⁹⁹ Thus, the legislature was able to regulate rent through this Act.

⁸⁷ Van Eeden and Barnard (2018) 610.

⁸⁸ Mohamed *Tenant and Landlord* (2010) 2.

⁸⁹ S 1 of the RHA.

⁹⁰ S 1 of the RHAA, not yet in force.

⁹¹ Van Eeden and Barnard (2018) 610.

⁹² S 1 of the RHA, Van Eeden and Barnard (2018) 610.

⁹³ S 1 of the RHA.

⁹⁴ S 1 of the CPA.

⁹⁵ Van Eeden and Barnard (2018) 610.

⁹⁶ Nagel *et al* (2015) 247.

⁹⁷ 80 of 1976.

⁹⁸ 80 of 1976. It introduced the Rental Boards that were responsible for regulating rent amount demanded by the lessor. Therefore the lessor's right to decide the amount for rent was limited.

⁹⁹ Tshela 2016 39.

The RCA was repealed by the RHA as amended by the RHAA.¹⁰⁰ The new Act does not impose any limitations on rent amount or grounds on which lessee's may be ejected from residential leased property.¹⁰¹ In my view, these are two crucial or weighty issues that the legislation was supposed to regulate or supervise probably to enable all citizens' decent and affordable accommodation. However, on the other hand, the Consumer Protection Act¹⁰² has an enormous impact with regard to rent, eviction and supervision of the lessor and lessee relationship.¹⁰³ As from the 1st of August 2000, the lessor and lessee relationship for housing purposes has been supervised by the RHA. The RHA seeks to give effect to the right to adequate housing as guaranteed by section 26 of the Constitution.¹⁰⁴

The RHA established and mandated the Rental Housing Tribunals (RHT)¹⁰⁵ to adjudicate disputes between lessor and lessee, if disputes or complaints are submitted to them.¹⁰⁶ In terms of the RHAA a Tribunal will be set up in each province.¹⁰⁷ The door was opened for any lessor and lessee to report any unfair practice to the Tribunal.¹⁰⁸ The success of the Tribunal will be based on the ability of the MEC of the province to put structures in place as well as appointing competent personnel to administer the Tribunal.¹⁰⁹ The Tribunal will then gather the details of complainant, scrutinize the dispute at hand and appoint a mediator to resolve the dispute.¹¹⁰ The Tribunal will be expected to make a fair and just determination to eradicate any unfair practice as reported.¹¹¹ It is my view that the RHAA lessened the burden of the court by creating a new structure to deal with the problems of the lessor and lessee. During the three months period, while the Tribunal is yet to make a ruling, the lessor may not eject the lessee for not paying rent unless if the amount is the same as before the complaint was lodged or raised.¹¹² Again, the lessee must continue paying the similar amount as like

¹⁰⁰ 35 of 2014, however RHAA is not yet in force.

¹⁰¹ Nagel *et al* (2015) 247.

¹⁰² 68 of 2008.

¹⁰³ Nagel *et al* (2015) 247.

¹⁰⁴ Nagel *et al* (2015) 247.

¹⁰⁵ Rental Housing Tribunals abbreviated RHT or Tribunal.

¹⁰⁶ S 13(1) of the RHA, Nagel *et al* (2015) 247.

¹⁰⁷ S 14 of the RHAA.

¹⁰⁸ S 13(1) of the RHA.

¹⁰⁹ Glover and Kerr (2014) 511.

¹¹⁰ S 13(2)(a) –(c) of the RHA.

¹¹¹ S 13(4)(c) of the RHA.

¹¹² Kopel S (2012) 227.

before and maintenance by lessor must be implemented.¹¹³ In the event that the Tribunal has failed to resolve the dispute, the lessor is free to approach the court of law in order to evict the lessee because the Tribunal cannot give an eviction order.¹¹⁴

Previously, the RHA permitted the lessee to request the lessor to provide a written copy of the lease agreement.¹¹⁵ The RHAA will make it compulsory for the lessor to reduce the lease agreement in writing.¹¹⁶ The written lease agreement will include the following information, names of lessor and lessee as well as their addresses, explanation of residential property, amount of rent to be paid for the leased property, place to pay the rent, intervals of paying the rent for example monthly, quantum of deposit, duration of lease together with notice period to curtail the lease, obligations of lessor and lessee and other extra charges that will be paid.¹¹⁷ In my view, the legislature has simplified supervision by indirectly encouraging standards contracts of residential lease. To ensure compliance of reducing the lease agreement to writing, the RHAA creates a general offence for non-compliance; while the RHA has been amended to ensure that one who does not comply with section 4 or subsection 5(1) will be guilty of a general offence liable to conviction or imprisonment not exceeding two years or both such fines.¹¹⁸

The enforcement of the rulings of the RHTs seems to be an impossible thing as remarked by Mohamed, who described RHTs as a structure without “teeth”¹¹⁹ because it lacked the power to enforce its rulings. The RHTs are expected to act according to the powers conferred on them by the legislation.¹²⁰ The RHTs are to consider complaints presented to them regarding ‘unfair practice’, resolve disputes through mediation, engage in investigations and conduct hearings and give orders.¹²¹ The courts have confirmed that the RHTs are to play various roles such as ‘administrative, investigative, enforcement and adjudicative’.¹²² (*Young Ming Shan*

¹¹³ Kopel S (2012) 227.

¹¹⁴ *Kendall Property Investments v Rutgers* (2005) 4 ALL SA 61 (C).

¹¹⁵ S 5(2) of the RHA.

¹¹⁶ S 5(1) of the RHAA. The preamble of RHAA requires leases to be reduced to writing.

¹¹⁷ S 5(6) of the RHAA.

¹¹⁸ SS 5(1) of the RHAA, (amending S 16(a) of the RHA).

¹¹⁹ Mohamed “Enforcement of Rental Housing Tribunals Orders” June 2008. *LexisNexis Property Law Digest* 12 (2) 3.

¹²⁰ Chapter 4 of the RHA.

¹²¹ Van Eeden and Barnard (2018) 633.

¹²² *Young Ming Shan CC v Chagan NO and Others* 2015 (3) SA 227 hereinafter referred to as *Young Ming Shan Case*. This case dealt with the a review of the decision of the Gauteng Rental Tribunal, the lessor implemented some extra charges allegedly in respect of electricity to the tenants in their block of flats. The landlord was

case). The courts clearly explained that the RHTs' functions though they are similar to that of a court, it is not a court of law in any respect.¹²³ The Gauteng Housing Tribunal was found wanting in the *Young Ming Shan case*; it could not enforce the decision it took on the complaint which was brought before it by the tenants of 32 and 34 Bruce Street in Hillbrow, Johannesburg.¹²⁴ I concur with Mohamed that the Tribunal lacks a structure to enforce its decisions.¹²⁵ The Magistrate Court is empowered by the Magistrates' Court Act¹²⁶ to instruct the sheriff to enforce its orders,¹²⁷ and the question is who has the powers to ensure that the RHTs orders are implemented. The Tribunal will be expected to give orders just like the Magistrate Court but the enforcement is not under the Magistrates' Court Act.¹²⁸ However, Glover and Kerr argues that the enforcement is one of the Magistrate court because the legislation clearly points out that the Tribunal may not deal with evictions and such matters must be referred to a competent court within 30 days.¹²⁹ Again, the enforcement in terms of the RHA¹³⁰ does not make the RHT a court of law.¹³¹ The court's order was similar to the one of the Tribunal in *Young Ming Shan case*¹³². It appears to me that the composition of the Tribunal in question was competent to decide regarding the lessor and lessee issues, however it has no platform to ensure orders are implemented. This trivialises the whole hearing or mediation process. On the other hand the Magistrate Court may refer a matter regarding unfair practice to the Tribunal.¹³³ Eventually, the order or ruling made by the Tribunal may be referred to High Court for review.¹³⁴

billed R385 monthly by City Power and the landlord went on to ask the tenants to pay a monthly consumption of electricity and service charge of R385 to every tenant within the block of flats while the landlord's cost was only R385 to the City Power.

¹²³ *Young Ming Shan CC v Chagan NO and Others* 2015 (3) SA 227. It was said that the simple fact that the order was equated to that of a Magistrate Court in terms of Magistrates' Court Act [32 of 1944] and it is enforced in line with S 13 (13) of the RHA.

¹²⁴ *Young Ming case* para 25; resulted in the review of the matter.

¹²⁵ Mohamed June 2008 *LexisNexis Property Law Digest* 12 (2) 3.

¹²⁶ 32 of 1944.

¹²⁷ S 13 – 15 Magistrates' Court Act.

¹²⁸ *Young Ming Shan CC v Chagan NO and Others* 2015 (3) SA para 32. However the rulings of the RHT will be reviewable and not appealable.

¹²⁹ Glover and Kerr (2014) 513-514; S 13(11) of the RHAA.

¹³⁰ S 13(13) of the RHA.

¹³¹ *Young Ming Shan case* para 41.

¹³² 2015 (3) SA.

¹³³ Van Eeden and Barnard (2018) 636.

¹³⁴ *Ethekwini Municipality v Kwazulu- Natal Rental Housing Tribunal and Others* (2010) ZAKZDHC 61, the matter was send back to the Tribunal because the actions were arbitrary and the entire hearing was rendered procedurally unfair. In *Perryvale Investments (Pty) Ltd v Patel NO* (2008) ZAWCHC 224, the ruling of the

The RHA as amended in RHAA, allows the MEC to recruit four to seven competent members to be in charge of the Tribunal in each province.¹³⁵ The Tribunal is to be made up of fit and proper members, with relevant qualifications and experience on the matters of rental housing property management and legal matters.¹³⁶ The RHAA mandates each province to establish a Tribunal.¹³⁷ The Tribunal will then be responsible for complaints of unfair practice in its province.¹³⁸

The legislation under discussion here is clear on its position regarding eviction that is not within territory or power of the Tribunal to evict the lessee.¹³⁹ The Tribunal does not have the powers to evict by the RHA.¹⁴⁰ It therefore means that the lessor who has an eviction matter will have to approach the competent court for a remedy.¹⁴¹ Tshehla states that dispute resolution revolving around eviction is too problematic and it appears it's the only available strategy to deal with lessee who doesn't want to pay rentals or one who has vandalised property.¹⁴² The RHA¹⁴³ introduced the Tribunal who will later be empowered by the RHAA.¹⁴⁴

The legislators hesitated to allow the Tribunal to give eviction orders.¹⁴⁵ The reasons are mainly because the Tribunal is not a court of law as cited by the court.¹⁴⁶ Tshehla conducted a comparison to ascertain conflicting rights in the residential housing legislation with a view to ascertain whether the law is doing enough to regulate or supervise the lessor and lessee in a proper way.¹⁴⁷ Tshehla analysed the response of the Constitutional Court in *Maphango v Aengus Properties (Pty) Ltd*¹⁴⁸ and *Malan v City of Cape Town*¹⁴⁹ to understand the character

Western Cape Rental Housing Tribunal which was in favour of the tenant to get remission of rent was set aside by the High Court.

¹³⁵ S 9(1) of the RHA as will be amended by in terms of the RHAA.

¹³⁶ S 9(1)(a) - (b)(ii) of the RHA will be amended by the RHAA.

¹³⁷ S 7 of the RHA.

¹³⁸ Van Eeden and Barnard (2018) 634.

¹³⁹ S 13(14) as amended by S 6 of the 2007 Amendment Act; Tshehla 2016 46.

¹⁴⁰ S 6(d) RHA elaborates that the Tribunal has no authority to hear complaints dealing with eviction orders.

¹⁴¹ Tshehla 2016 46.

¹⁴² Tshehla 2016 48-49.

¹⁴³ 50 Of 1999.

¹⁴⁴ 43 of 2007.

¹⁴⁵ Tshehla 2016 50.

¹⁴⁶ Mohamed "Enforcement of Rental Housing Tribunals Orders" June 2008. *LexisNexis Property Law Digest* 12(2)3; *Young Ming Shan case* para 41.

¹⁴⁷ Tshehla 2016 42.

¹⁴⁸ 2012 (3) SA 5 hereinafter referred to as *Maphango case*. The private landlord was not able to acquire an eviction order.

¹⁴⁹ [2014] ZACC 25 hereinafter referred to as *Malan case*. The landlord who is an organ of state secured eviction order.

of the courts when dealing with the eviction focusing on a given legislation.¹⁵⁰ After a further evaluation, the court referred the matter back to the Tribunal and the court clearly declared that the issue was for the Tribunal to decide if the stopping of a lease agreement for the reason of increasing rent amounted to unfair practice in terms of the RHA.¹⁵¹ In the *Malan case* the court was satisfied that the grounds of eviction were just and equitable probably because the respondent had made alternative housing available.¹⁵² I agree with Tshehla that the court changed the way in which the right to evict is implemented because the courts interrogated if the eviction was just and equitable; it seems alternative accommodation hinders the eviction process if it's not available.¹⁵³

2.4 The Consumer Protection Act (CPA)

It is not my intention to provide a detailed discussion of the entire CPA but it must be noted that consumer rights (tenants) are also outlined in this Act.¹⁵⁴ I will discuss sections 44, 48 and 49 of the CPA in my third chapter which deals with abuse or unfair contract terms. The CPA is relevant to deals or transactions¹⁵⁵ within South Africa dealing with the supply of products and services to customers if parties transacted within the ordinary course of business.¹⁵⁶ The purpose of the CPA is outlined as follows in section 3(1);

3(1) 'promote and advance the social and economic welfare of consumers in South Africa by-

- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
- (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers;
 - (i) Who are low-income persons comprising low-income communities;
 - (ii) Who live in remote, isolated or low-density population areas or communities;
 - (iii) Who are minors, seniors or other similarly vulnerable consumers; or.....

¹⁵⁰ Tshehla 2016 43.

¹⁵¹ *Maphango v Aengus Lifestyle Properties Pty Ltd* 2012 (3) SA 5 para 67.

¹⁵² Tshehla 2016 46.

¹⁵³ Tshehla 2016 46.

¹⁵⁴ Consumer rights are in Chapter 2 of CPA.

¹⁵⁵ S 1 of the CPA, transaction conducted by persons acting in the ordinary course of business and should be an agreement between one or two or more persons to supply or exchange goods and services.

¹⁵⁶ S 5(1) of the CPA. Unless if it's exempted by subsection (2) or in terms of subsection (3) or (4).

- (c) promoting fair business practices;
- (d) protecting consumers from-
 - (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practises; and...'

It is vital to note that a 'consumer' is defined as an individual to whom goods and services have been marketed or one who took part in a transaction to receive the goods or services being sold.¹⁵⁷ While on the other hand, the 'supplier' is the one who supplies the goods or services; and it also includes renting, selling, exchanging or hiring; and all must be done during the 'ordinary course of business'.¹⁵⁸

It is important to note that the CPA is applicable to both residential housing and commercial leases.¹⁵⁹ Laubscher comments that for one to establish application of the CPA the meaning of section 1 as included in section 5 must be critically analysed with lease agreements in mind.¹⁶⁰ However, the CPA does not cater for 'juristic persons' whose yearly turnover is equal or above R2 million at the time of concluding the lease contract with the lessor (the supplier) and tenants (the consumers) or any threshold value set by the responsible Minister.¹⁶¹ It is important to note that the RHA does not place limitations in terms of yearly turnover, what is vital is that it must be a residential lease for the RHA to be applicable. In this Act 'service' has been defined to cover access or use of any property or premises being rented.¹⁶² Rental meaning is not clear, since rent is not an agreement. However, it is important to mention that the contract of lease itself is an agreement.¹⁶³ The supplier must endeavour to do all transactions in the 'ordinary course of business', unfortunately the term was not defined by the legislation.¹⁶⁴ Monty and Stoop comments on the interpretation is debatable in that the Act will be implemented only for those in commercial or business leasing for example, those who own commercial premises like malls being leased, car rentals and accommodation under hospitality industry.¹⁶⁵ Therefore, in terms of the previous interpretation lessors who lease residential houses in their individual or private initiative will not be subject to the Act, unless

¹⁵⁷ S 1 of the CPA.

¹⁵⁸ S 1 of the CPA.

¹⁵⁹ S 5 (2)(b) read together with GN 294 in Government Gazette 34181, Nagel *et al* (2015) 249.

¹⁶⁰ Laubscher 2016 *NWU* 5.

¹⁶¹ S 5(2)(b) read together with GN 294 in Government Gazette 34181, Nagel *et al* (2015) 249.

¹⁶² S 1 of the CPA.

¹⁶³ Glover and Kerr (2014) 336.

¹⁶⁴ Glover and Kerr (2014) 336.

¹⁶⁵ Monty S "Property lease agreements: Are they or aren't they?" (2011) 11 (8) *Without Prejudice* 46 hereinafter referred to as Monty (2011); Stoop P "Law of Lease" (2009) *Annual Survey of South African Law* 860.

they transact in the 'ordinary course of business' otherwise the other legislation will be applied.¹⁶⁶ The court, reiterated that the term 'ordinary course of business' does not have a meaning in the CPA but in *Van ZYL & others NNO v Turner & another NNO*¹⁶⁷ where the court had to decide if the disposition regarding the insolvency case was made in line with the above named phrase.¹⁶⁸ The court pointed out that an objective test must be carried out to consider all the circumstances of the consumer and supplier involved in the transaction.¹⁶⁹ The legal question was whether Eskom was liable in terms of section 61 of the CPA for the injuries suffered by Mr Halstead-Cleak.¹⁷⁰ Eskom was found not liable to the charges in terms of section 61 since Mr Halstead-Cleak was not a consumer to Eskom.¹⁷¹ However, Hamers and Robertson are of the view that in *Eskom Holdings case*, section 14(2)(b)(ii) of the CPA must be read with the entire provision of the CPA, most importantly, section 14(2)(b)(i)(bb).¹⁷² When the two cancelling sections are read together, it becomes clear that the CPA does not have an aim of placing a requirement that 'the consumer must be expressly notified of the fact that he has 20 business days' to correct the breach of the terms of contract.¹⁷³ The provision simply asks the supplier to give notice to the consumer of the material failure firstly and then allows the supplier to stop the contract after a duration of 20 business days has passed if the consumer has failed to comply.¹⁷⁴

It is amazing that if there is dissimilarity or disparity within the provisions of CPA and RHA, both legislation will be applied simultaneously, to such an extent that it will be better to apply and follow one of the provisions with differences without acting contrary to the other.¹⁷⁵ The fixed contract in terms of the Act should not exceed two years.¹⁷⁶ Laubscher notes that the Regulations¹⁷⁷ emphasise that the maximum period of a fixed-term agreements for the

¹⁶⁶ Glover and Kerr (2014) 336.

¹⁶⁷ *Van ZYL & others NNO v Turner & another NNO* 1998 (2) SA236 (C) para 34

¹⁶⁸ *Eskom Holdings Limited v Halstead-Cleak* ZASCA 150 (30 September 2016) para 20.

¹⁶⁹ *Eskom Holdings Limited v Halstead-Cleak* ZASCA 150 (30 September 2016) para 20 hereinafter referred to as *Eskom Holdings case*.

¹⁷⁰ *Eskom Holdings Limited v Halstead-Cleak* ZASCA 150 (30 September 2016) para 1.

¹⁷¹ *Eskom Holdings Limited v Halstead-Cleak* ZASCA 150 (30 September 2016) para 28.

¹⁷² Hamers & Robertson "The effect of the CPA on cancelling residential lease" 2018 June *Property Law Digest* 5, hereinafter referred to as Hamers and Robertson *Property Law Digest* 2018.

¹⁷³ Hamers and Robertson *Property Law Digest* 2018 5.

¹⁷⁴ Hamers and Robertson *Property Law Digest* 2018 5.

¹⁷⁵ S 2(9)(a) of the CPA.

¹⁷⁶ S 14(1) of the CPA.

¹⁷⁷ Regulation 5(1)(a) of GN293 in GG 34180 of 1 April 2011.

purpose of using section 14(4)(a) of the CPA must be two years from the date the consumer signed the agreement.¹⁷⁸ The RHA does not impose time frame for the contract. It is crucial to highlight that transactions between legal persons, irrespective of their annual income or net worth of assets, or whether the transaction was done during the 'ordinary course of business', the Act will not apply to the transaction.¹⁷⁹ The narrow meaning or interpretation of the CPA does not permit the Act to be used for residential lease contracts and advocates that common law or other laws of lease must be used.¹⁸⁰ The idea is derived from the principle *generalia specialibus non derogat*, meaning that the area of residential lease is already over regulated by other legislation such as RHA.¹⁸¹ Furthermore, Van Eeden and Barnard comment that Glover and Kerr, and Delpont are of the opinion that if the CPA was to be considered applicable to the residential lease contracts, the degree of application must be very small.¹⁸² The reasons for the argument include the 'general and overarching' content of the CPA and other industry-specific legislation such as the RHA and the PIE. It must be noted that residential lease is removed from the general consumer protection laws. Section 14¹⁸³ brings grey areas within the ambit of the law and the institutions to implement orders of the RHA and the CPA¹⁸⁴ require clarity such as the Rental Housing Tribunal created by the RHA, an institution that must be considered as an option for dispute resolution in terms of CPA¹⁸⁵ or consumers can use another alternative route as stated;¹⁸⁶ and entirely follow redress in line with the RHA.¹⁸⁷

Besides, the narrow interpretation of the CPA can be given a broader meaning to embrace the contract of residential lease.¹⁸⁸ Consideration must be given to the exact writing of the Act focusing on the purpose of the legislation, it must not be given a limited interpretation but a much broader perspective to include problematic relationship of the consumer and

¹⁷⁸ Laubscher 2016 *NWU* 136.

¹⁷⁹ S 14(1) of the CPA.

¹⁸⁰ Glover and Kerr (2014) 336.

¹⁸¹ Glover and Kerr (2014) 336-337, Delpont H "Problematic aspects of the Consumer Protection Act 68 of 2008 in relation to property transactions: Linked Transactions, Fixed –Term Contracts and Unsigned Sale Agreements" 2014 *Obiter* 60-80 hereinafter referred to as Delpont 2014.

¹⁸² Van Eeden and Barnard (2018) 610.

¹⁸³ S 14 deals with fixed term agreements.

¹⁸⁴ S 69 of the CPA.

¹⁸⁵ S 70 of the CPA.

¹⁸⁶ S 69 of the CPA.

¹⁸⁷ Glover and Kerr (2014) 337; Delpont 2014 71-97 and 80; Laubscher 2016 *NWU* 173-176.

¹⁸⁸ Glover and Kerr (2014) 337.

supplier in a residential lease contract.¹⁸⁹ The Act must be allowed a broader approach as was suggested by the Supreme Court of Appeal in *Amalgamated Banks of South Africa Bpk v De Goede*.¹⁹⁰ The Court gave meaning to the term “ordinary course of business”, even though the court was interpreting it from tax law perspective.¹⁹¹ The court decided that the term should not be interpreted to say that one conducts business daily or constantly, but whether the person conducts a juristic act or deals with normally used terms and with a financial motive or drive.¹⁹² Therefore, if one leases his or her own apartment to generate extra income the act will equal “ordinary course of business”, and such a lease will be governed or regulated or supervised by the terms of the CPA.¹⁹³ A test must be carried out to decide whether the contract is in the ambits of ordinary course of the party’s business and whether the term is normally used by ordinary business people would have entered into the circumstances.¹⁹⁴ I concur with Glover and Kerr that this is a correct approach to take.¹⁹⁵

It is also pertinent to analyse how the CPA affects supervision or regulation of the contract of residential lease. There are some undesirable effects for the leases that can be regulated by it.¹⁹⁶ Section 14 is the most questionable and problematic and brings legal uncertainty, which governs the so called fixed term agreements.¹⁹⁷ Laubscher states that the application of section 14 to the fixed term lease agreements has caused ‘undesirable restrictions, unfair preferences and allowances of’ continuous violation of the lease agreements.¹⁹⁸ A portion of section 14 reads as follows:

- ‘1. This section does not apply to transactions between juristic persons regardless of their annual turnover or asset value.
2. If a consumer agreement is for a fixed term-

¹⁸⁹ Glover and Kerr (2014) 337; S 3 of CPA mandates that S 2 of must be interpreted to give to allow effect of S 3. The general framework of S 3 is to further fair consumer practice and protection of consumers.

¹⁹⁰ 1997 4 SA 66 (SCA) at 78-8.

¹⁹¹ Glover and Kerr (2014) 337.

¹⁹² Glover and Kerr (2014) 337.

¹⁹³ Sharrock S “Judicial control of unfair contract terms: the implications of the Consumer Protection Act” (2010) 22 SA Merc LJ 295 at 302; Naudé T “The consumer’s right to safe, good quality goods and the implied warranty of quality under section 55 and section 56 of the Consumer Protection Act 68 of 2008” (2011) 23 SA Merc LJ 336 at 337-338.

¹⁹⁴ *Encor NO v Rensco Motors (Pty) Ltd* 1981 (1) SA 815 (A) at 824-5; *Joossab v Encor* NO 1966 (1) SA 319 (A) at 326.

¹⁹⁵ Glover and Kerr (2014) 337.

¹⁹⁶ Glover and Kerr (2014) 338.

¹⁹⁷ Glover and Kerr (2014) 338.

¹⁹⁸ Laubscher 2016 NWU 7.

- a) that term must not exceed the maximum period , if any, prescribed in terms of subsection (4) with respect to that category of the consumer agreement; (b) despite any provision of the consumer agreement to the contrary (i) the consumer may cancel that agreement-
 - (aa) upon the expiry of its term, without penalty or charge, but subject to subsection (3)(a); or
 - (bb) at any other time , by giving the consumer 20 business days’ notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b); or
- (ii) the supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within time that time...’

Delpont states that lease agreements are for a specific timeframe or the period of the lease is set by the lessor and lessee for instance one or two years and the author questions if the fixed agreement is the one mentioned in section 14.¹⁹⁹ Furthermore, Delpont comments that several legal practitioners concur that section 14 is applicable to leases while few do not agree that the section is applicable to residential lease.²⁰⁰ The court also concurred that a consumer is entitled to be protected by the CPA in terms of the section 14.²⁰¹ The section does not cater for juristic persons no matter their yearly sales; the fixed term contract must not overlap the set maximum timeframe; consumer is allowed to stop the contract without attracting any charges by announcing to the supplier a twenty business day notice in writing; supplier also is permitted to curtail the contract after giving a written notice if the consumer has failed to abide by the terms of the agreement.²⁰² The supplier is expected to notify the consumer about the expiry of the fixed term contract not less than 40 or not more than 80 business days before the contract ends.²⁰³ On the other hand, a fixed term agreement will not stop at the lapse of the duration, unless if the lessee who is the consumer has directly informed the supplier.²⁰⁴ In the event that consumer wants to terminate, one months’ notice will be given, meaning the consumer will not have possession of the premises for a month.²⁰⁵ The CPA states that if

¹⁹⁹ Delpont (2014) 71.

²⁰⁰ Delpont (2014) 71-72.

²⁰¹ *Transcend Residential Property Fund Limited v Mati* 2018 4 SA 515 (WCC) para 48 and para 54, hereinafter referred to as *Transcend Residential Property Fund case*.

²⁰² S 14(1) – (2)(ii) of CPA; Regulation 5 of the CPA.

²⁰³ S 14(2)(c) of the CPA.

²⁰⁴ S 14(2)(d) of the CPA. The contract will proceed from one a month to month basis.

²⁰⁵ Delpont (2014) 75.

the contract is of the 'fixed term nature' it must not go beyond twenty four months.²⁰⁶ It must also be remembered that several contracts fall into this category simply because there is a starting date and expiry date which can be days, weeks or months, which make them to be fixed term agreements.²⁰⁷ The above discussed sections are unsuitable to the residential contract of lease, because the duration of the lease may surpass 24 months and cancellation of contract by the consumer can be done by giving a written notice of 20 business days, no violation of terms is required.²⁰⁸ Glover and Kerr comments that such consequences are highly extraordinary in the contract of residential lease.²⁰⁹ However, regarding the month-to-month residential lease contract, it is not possible to call for a 20 business day notice to curtail a monthly lease.²¹⁰ It is correct that some leases are of a smaller duration but the major impact is for the long leases which may be, for example, more than ten years.²¹¹ In the event that the lessor and lessee prefer to have a contract longer than the prescribed one in the CPA, they will have to show that there is some "demonstrable financial benefit".²¹² A good example for a financial benefit would be a price reduction for such a fixed term agreement.²¹³ Monty avers that it clearly shows that the legislature did not have leases in mind when the provisions were drafted.²¹⁴ The effect is that the legislation makes it difficult to set up a contract beyond two years.²¹⁵ Glover and Kerr wonders if the aim of the CPA was to completely exclude long leases.²¹⁶ I agree with Glover and Kerr that section 14,²¹⁷ can be corrected to exclude or remove long lease agreements.²¹⁸

Glover and Kerr comment that an analysis of section 14, reflects that probably it was drafted for other types of contracts for example cell phone contracts, building contracts and so on.²¹⁹

²⁰⁶ S 14(2)(a) of the CPA.

²⁰⁷ Delport (2014) 72.

²⁰⁸ Glover and Kerr (2014) 338.

²⁰⁹ Glover and Kerr (2014) 338.

²¹⁰ *Makah v Magic Vending (Pty) Ltd* 2018 3 SA 241 (WCC) para 11.

²¹¹ Glover and Kerr (2014) 367; this period would considered longer and would require registration.

²¹² Glover and Kerr (2014) 367.

²¹³ Delport (2014) 73-74. It must be noted that such discounts or price reductions are not common.

²¹⁴ Monty (2011) 47.

²¹⁵ Monty (2011) 47; Delport (2014) 72. Agreement with at least a minimum of fixed period of 40 business days and a maximum of 2 years or 24 months will be applicable after analysis of S 14(2)(c) of the CPA.

²¹⁶ Glover and Kerr (2014) 338.

²¹⁷ Act 68 Of 2008.

²¹⁸ Glover and Kerr (2014) 368.

²¹⁹ Glover and Kerr (2014) 338.

The permission of enforcing a cancellation penalty does not solve the effects of CPA on lease contracts.²²⁰

It is submitted that the section 14 can be rectified to exclude long leases from being regulated by the Act.²²¹ Furthermore, leases governed by section 14 are affected by the consumer rights mentioned in the Act.²²² Also, the lessor will not be permitted to advertise a chance or opportunity to lease neither finalise the contract on grounds that are unfavourable to the lessee; language of contract should be simple or familiar to the lessee.²²³ The lessor is entitled to or has power to lease the premises at the time the lessee is about to occupy the leased property.²²⁴ Another limitation is that the contract cannot be affected by the need of the consumer requiring to seize any money to the supplier to which the supplier does not have a right to.²²⁵ The Act also prevents an agent from entering the leased premises to seize property relating to the set agreement, however it is argued that this does not intrude with the lessors' hypothec for rent since it is well regulated or supervised.²²⁶

Section 14 relating to the rights of cancellation have several implications regarding the common law rights as well as remedies to lessor and lessee. All clauses in such a lease seeking immediate cancellation of the lease on failure by consumer to pay the rent due are unenforceable, which means that even though the contract maybe valid but it cannot be enforced by the court because of the some technical defects.²²⁷ Smith states that eviction process in terms of the PIE will be slowed down since they can only resume after the notice period of 20 business days. Claims of outstanding amount is not hindered by section 14.²²⁸ Smith also suggest that the tenant can develop a habit to frustrate the lessor and pay the outstanding amount on the 19th business day.²²⁹ Furthermore, lessors may opt to enter into

²²⁰ S 14(3)(b) of CPA; Regulation 5 (2)(a) – (j) of the CPA.

²²¹ GN 34400 of 27 June 2011. The responsible minister was willing to exclude fixed term bank deposits from supervision of S 14 of CPA.

²²² Glover and Kerr (2014) 338; consumer rights are in Chapter 2 of CPA.

²²³ S 8; S 9; S 22 of the CPA.

²²⁴ S 44(1)(b)(ii) of the CPA.

²²⁵ S 51(1)(h) of the CPA.

²²⁶ S 51(1)(i) of the CPA.

²²⁷ Smith CP *Eviction & Rental Claims: A Practical Guide* (April 2018) Chapter 18 page 23 hereinafter referred to as Smith CP (April 2018).

²²⁸ Smith CP (April 2018) ch 18 pg 23.

²²⁹ Smith CP (April 2018) ch 18 pg 24.

month-to-month residential leases running away from the detrimental effects of section 14.²³⁰

Laubscher comments that the CPA is applicable to a lease agreement if the landlord has met 'the requirements of being a supplier' who is also doing business in the 'ordinary course of business'.²³¹ The CPA is not applicable to a lease which doesn't meet the specifications of 'ordinary course of business'.²³² Once-off leases not entered into the 'ordinary course of business' do not fall within the ambit of the CPA since they are not viewed as continuous marketing of goods and services from the supplier as noted by Laubscher.²³³

Apart from the provisions of section 14, I will also examine the impact of section 13(1) which involves linked agreements also called 'tying arrangements'. Delpont comments that section 13(1) is applicable to 'plot-and-plan transactions' involving the property developers and the leases of immovable property where the lessee is allowed to go into an agreement with third parties such as a security service providers or one for gardening services.²³⁴

Section 13(1) reads as follows:

- (1) stipulates that a supplier must not require, as a condition of offering to supply or supplying any goods or services, or as a condition of entering into an agreement or transaction, that the consumer must--
- (a) purchase any other particular goods or services from other supplier;
 - (b) enter into any additional agreement or transaction with the same supplier or a designated third party; or
 - (c) agree to purchase any particular goods or services from a designated third party, unless the supplier offers bundled goods or services separately and at individual prices, or if he can show that (i) the convenience of building the goods or services outweighs the limitations imposed on the consumer; or (ii) the building of the goods or services results in economic benefit for consumers'.

A lease agreement and a sale transaction packed in this manner is regulated by section 13(1) and a duty is on the consumer to accept an extra agreement with maybe another person or

²³⁰Smith CP (April 2018) ch 18 pg 25.

²³¹S 1 of the CPA.

²³²Laubscher 2016 *NWU* 134.

²³³Laubscher 2016 *NWU* 134.

²³⁴Delpont (2014) 60.

the same supplier.²³⁵ Delport comments that completing an agreement in this manner is prohibited unless if such an agreement is brought within the exceptions of section 13(1).²³⁶ Furthermore, section 50(2)(a) stipulates that if a consumer agreement is written either as mandated by the Act or voluntarily such an agreement is binding and enforceable whether the consumer signed it or not.²³⁷

It is not clear whether the CPA does affect the Rental Housing Tribunals.²³⁸ Conclusively, it is submitted that the law of lease is affected to a lesser extent by the CPA compared to law of sale.²³⁹ Again it is noted that section 14 is aimed at 'take-it-or-leave-it basis' where the consumer is not given a choice to determine the duration of the agreement.²⁴⁰ I agree with Delport that sections 13(1) and 50(2)(a) of the CPA are less problematic regarding property transactions unlike section 14 which was drafted badly making it very difficult to interpret and to decide application of it to residential lease contract.²⁴¹ Barnard comments that 'the application of section 14 to residential lease agreements may not benefit the consumers generally.'²⁴² Furthermore, Barnard also stated other 'practical problematic issues of section 69 of the CPA when it comes to the enforcement and redress measures' it is not clear on who the consumers must approach for dispute resolution.²⁴³

²³⁵ Deplort (2014) 69.

²³⁶ Delport (2014) 69.

²³⁷ S 50(2)(a) of the CPA.

²³⁸ Glover and Kerr (2014) 340.

²³⁹ Glover and Kerr (2014) 340.

²⁴⁰ Delport (2014) 78.

²⁴¹ Delport (2014) 80.

²⁴² Barnard J (2019) *THRHR* 175.

²⁴³ Barnard J (2019) *THRHR* 172-173.

2.5 Prevention of Illegal Eviction from Unlawful Occupation of Land Act²⁴⁴ (Hereinafter referred to as PIE)

Initially, there was much controversy regarding the PIE as to whether or not it was applicable to lessor and lessee in a residential contract of lease. This paragraph seeks to investigate the eviction procedure of the tenant who has refused to leave the premises in a residential lease contract. Over the years, the South African courts have given clarity as to the interpretation of the term 'unlawful occupier' as will be shown later under this sub-heading. Delpont avers that the PIE brought dignity to the lessee regarding evictions as well as brought several parties to the play field if the court is to make a just and equitable decision regarding eviction of the tenant following the procedure outlined in the PIE.²⁴⁵ Furthermore, it is submitted that the PIE embraces, promotes and is founded on the Constitutional values entrenched in the supreme law of our nation.²⁴⁶ Under this sub-heading, various case law will be examined to bring to the fore the background and the current situation of the PIE regarding supervision of eviction of tenants in a residential contract of lease.

To commence the discussion, it is important not to ignore the purpose of the PIE. The PIE was promulgated to supervise the ejection of unlawful occupiers of land who at the coming to force of the Act was not clear as to who is an unlawful occupier and who is not.²⁴⁷ Apart from the prevention of unlawful evictions, the PIE also encourages the court to investigate, consider and give special consideration to the entitlements of children, the old, those disabled and single mothers.²⁴⁸ The 'unlawful occupier' has been defined as one who is in charge of land but without clear permission from the owner of the land or one who has no right to be at that land. This excludes the occupier in terms of the Extension of Security of Tenure Act²⁴⁹ and also exclude occupier in terms of Protection of Informal Lands Rights Act (31 of 1996).²⁵⁰ The PIE is to apply throughout South Africa and eviction should not be implemented without

²⁴⁴ 19 of 1998.

²⁴⁵ Delpont "Eviction of the tenant after termination of a lease of residential premises" (2008) *Obiter* Vol 29 473 hereinafter referred to as Delpont (2008); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

²⁴⁶ S 26 of Constitution; PIE promotes the right to have access to adequate housing and promotes visiting the court of law before implementing eviction.

²⁴⁷ Glover and Kerr(2014) 480; Some argue that PIE is crucially socialistic created on humanitarian mind set stated in *Port Elizabeth Municipality v Peoples dialogue on Land Shelter* 2000 2 SA 1074 (E).

²⁴⁸ Glover and Kerr (2014) 480.

²⁴⁹ 62 of 1997.

²⁵⁰ 62 of 1997 (referred to as the ESTA in this paper); S 1 of the PIE.

a court's order, which means the lessor must approach a competent court of law to be authorised to evict the lessee.²⁵¹

Delport states that, initially, the landlords were not aware of the existence of the PIE Act thinking that it couldn't be implemented for the tenants whose leases have been curtailed lawfully.²⁵² The PIE was interpreted in such a way that it was eliminating the former tenants or lessee (those who holdover) as was shown in *ABSA Bank Ltd v Amod*.²⁵³ It was agreed that the contract between the lessor and lessee would have been terminated, therefore, the lessees, if they remained in the residential premises, do not equal to unlawful occupiers.²⁵⁴ The court analysed the provision at the time of promulgation and it concluded that 'land' in the scenario of the 'unlawful occupier' amount to unoccupied land and that the 'unlawful occupier' was that person who moved into the land without following the required procedure, occupied it and set up premises.²⁵⁵ The course of direction changed when the court was of the view that the court had previously failed to interpret the provisions of the PIE and the Act should be given a broad interpretation.²⁵⁶ The court argued that the Act is not restricted to those who dwell in informal settlements only, but it must be extended also to 'unlawful occupiers in general'. The decision was arrived at after a proper evaluation of section 4(1) of the PIE and furthermore, the provisions of the section 26(3) of the Constitution must be awarded wider interpretation.²⁵⁷ Later in 2003, the tables were turned when the judges had a different view regarding the 'unlawful occupiers'. The minority concluded that the PIE should not be interpreted to cover persons who have remained in the premises on termination of the residential lease but it should only cover the squatters.²⁵⁸ Contrary to the minority judgment, the majority viewed the matter from a different perspective and based

²⁵¹ S 2 of the PIE; S 8(1) prevents ejection of an unlawful occupier unless being implemented as an order of a competent court.

²⁵² Delport (2008) 477.

²⁵³ [1999] 2 ALL SA 423 (W); *Ellis v Viljoen* 2001 4 SA 186 (C). In *Ellis case* it was held that the PIE act will not apply to the tenants who preliminary took occupation as a result of a contract with the authority of the owner.

²⁵⁴ *ABSA Bank Ltd v Amod* [1999] 2 ALL SA 423 (W) at 428d- e; hereinafter referred to as *ABSA Bank case*.

²⁵⁵ *ABSA Bank Ltd v Amod* [1999] 2 ALL SA 423 (W) at 599-600. This decision was referred to in several court cases for example; *Ross v Smith Peninsula Municipality* 2000 1 SA 589 (C) at 597; *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 4 SA 468 (W) at 4731; *Ellis v Viljoen* 2001 4 SA 795 (C) at 7991/J.

²⁵⁶ *Bekker v Jika* [2001 4 ALL SA 573 (SE); however this case is about a mortgage not lease. S 26 of the Constitution was referred for the court to reach a conclusion. (Hereinafter referred to as *Bekker case*).

²⁵⁷ *Bekker case* at 579c.

²⁵⁸ *Ndlovu v Ngcobo* 2003 1 SA 113 (SCA) at para 40; para 43; para 80; para 81; para 90 it must be noted that this matter was for a tenant who had remained in the premises after the contract of lease had been extinguished. (Hereinafter referred to as *Ndlovu case*).

their interpretation on language or tenses and concluded that it is extremely difficult to remove the tenants who have remained in the premises after termination of the residential lease contract and business or commercial lease should not be regulated by the PIE, instead, common law must be applied.²⁵⁹ The decision sparked an uproar from the Department of Housing which began a campaign that the PIE should be changed to exclude the law of the tenant and lessor.²⁶⁰ Several drafts were enacted but they were not adopted.²⁶¹ The decision in *Ndlovu case* was reiterated by the Supreme Court of Appeal and other Constitutional Court cases.²⁶² ‘Unlawful occupier’ meaning and application were further examined in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*²⁶³ and the court concurred with the decision in *Ndlovu case* that the PIE must be implemented to the tenants who once had permission to occupy the premises.²⁶⁴ Furthermore, the courts followed the decision in *Ndlovu case* in the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*²⁶⁵ and other preceding court cases regarding lease agreement.²⁶⁶ It is submitted that though the decision in *Ndlovu case* brought a lot of argument in the beginning but it later shed more light on the Constitutional Court and turned or shifted the situation.²⁶⁷ The insertion of section 4B(9)(d)(ii) into the RHA 2014 changes of 2014 and dissolved all the doubts as to whether or not the PIE should regulate the residential lease contracts.²⁶⁸

The PIE incorporates clear steps on what must be done during eviction to fulfil the mandate of section 26(3) of the South African Constitution which states that no ejection of an unlawful occupier must be carried out without a court order and that such a court must critically

²⁵⁹ *Ndlovu case* at para 6-11; para 20; the procedure outlined in the PIE must be remembered even though the applications were initiated using common law; the court advised parties in following cases to follow suit; *Kendall Property Investments v Rutgers* [2005] 4 ALL SA 61 9 (C); *Jackpersad NO v Mitha* 2008 4 SA 522 (D) and *Occupiers, Shulana Court, 11 Hendon Road Yeoville, Johannesburg v Steele* 2010 9BCLR 911 (SCA).

²⁶⁰ GN2276 GG25391 of 27th August 2003.

²⁶¹ Glover and Kerr (2014) 485.

²⁶² *Occupiers, Shulana Court, 11 Hendon Road Yeoville, Johannesburg v Steele* 2010 9BCLR 911 (SCA); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC).

²⁶³ 2010 3 SA 454 (CC).

²⁶⁴ Piennar and Van Wyk “Land” LAWSA Vol 14 (1) para 168.

²⁶⁵ 2012 2 SA 104 (CC).

²⁶⁶ *Hattingh v Juta* 2013 3 SA 275 (CC) para 33; *Malan v City of Cape Town* [2014] ZACC 25 para 83.

²⁶⁷ Glover and Kerr (2014) 485.

²⁶⁸ Amendments of RHA 2014.

investigate the circumstances of the matter before it.²⁶⁹ It is clear that the law has brought various participants or interested parties to take part before an eviction is carried out. In *Port Elizabeth Municipality v Various Occupiers*²⁷⁰ it was alluded that the court must ‘have regard’ to circumstances, give special attention to the matter and ensure that the decision will be just and equitable, which means detailed information is required before reaching a conclusion.²⁷¹ The procedure to evict a private unlawful occupier is clearly outlined in the PIE.²⁷² The PIE Act mentions a procedure for the unlawful occupier who has occupied the land for less than six months and another procedure for the one who has been on the premises or land for more than six months.²⁷³ In both circumstances, the rights of the old, children, those with disabilities and single mothers must be observed. The circumstances include the ‘means, age, state of health, marital and other status of the respondents and their dependants’.²⁷⁴ It must be noted that to implement the PIE Act procedures to eject unlawful tenants where few tenants are involved tends to be simple unlike if there are many tenants to be evicted.²⁷⁵ It is therefore encouraging to bring several stakeholders together such as the municipalities, departments of national or provincial government in what is termed as ‘joinder’²⁷⁶ to discuss sensitive issues as well as options available. This is called ‘meaningful engagement’.²⁷⁷ The two terms in my view prolong and complicate the court procedures. Muller and Liebenberg noted that the court in several judgments mentioned that eviction of unlawful occupiers will

²⁶⁹ Glover and Kerr (2014) 486; this is further supported by S 8(1) of the PIE which state that no one is permitted to remove an unlawful occupier unless they have the mandate of a competent court.

²⁷⁰ 2005 1 SA 217 (CC) hereinafter referred to as *Port Elizabeth Municipality case*.

²⁷¹ 2005 1 SA 217 (CC) para 32.

²⁷² S 4 of the PIE.

²⁷³ S 4 of the PIE.

²⁷⁴ *Wintertide Trading 89 CC v Thompson and Others* (2534/2009) [2010] ZANWHC 14 (20 May 2010) para 20; in this case the facts leading to the destituteness of the respondents was not shown, the unlawful occupiers of EFR 82 UNIT 3, MMABATHO, did not cooperate to give their personal details, however the court required that to grant an order; In *Jackpersad NO v Mitha* 2008 4 SA 522 (D) at 529E, the court looked at relevant or special circumstances before granting a just and equitable eviction order.

²⁷⁵ Glover and Kerr (2014) 488.

²⁷⁶ Muller and Liebenberg “Developing the law of joinder in the context of evictions of people from their homes” 2013 *SAJHR* 554 hereinafter referred to as Muller and Liebenberg (2013). Joinder the respective municipalities and responsible government departments within the jurisdiction as interested parties are brought together to participate in the court proceeding because in several if not occasions the decisions given by the courts regarding evictions affect them directly.

²⁷⁷ *Port Elizabeth Municipality case* para 35; the court emphasised meaningful engagement and in *Olivia Road and Residents of Joe Slovo Community cases* the Constitutional Court requested for meaningful arrangement.

not take place if there is no joinder of particular municipalities.²⁷⁸ Without the presence of municipalities, the courts may defer or procrastinate the court proceedings.²⁷⁹ Furthermore, another oral concept introduced by the courts during evictions is 'meaningful engagement'.²⁸⁰ The court is of the view that 'meaningful engagement' assists to eliminate the disputes between the parties engaged in a dispute if conducted well by honest and empathic parties.²⁸¹ Chenwi and Tissington states that the unlawful occupiers are expected to appreciate the financial and policy challenges of providing for various interested parties, while on the other hand, the state must listen to the case and give feedback to the unlawful occupiers.²⁸²

To conclude eviction of lessee after the termination of a residential lease of contract is a contentious issue; it appears that the common law position gives a vantage point to the landlord.²⁸³ It is also clear that the PIE Act regulates removal of tenants as was decided by the courts of law.²⁸⁴ Delpont comments that the PIE Act endeavours to equalise the interests of the lessor and the lessee during the expulsion process and it appears that it gives protection to the lessee who was in a disadvantaged position due to the common law that was favouring the landlord.²⁸⁵

²⁷⁸ Muller and Liebenberg (2013)558; *ABSA Bank Ltd v Murray* 2004(2) SA 15 (C) para 41; hereinafter referred to as *ABSA Bank v Murray case*; *Blue Moonlight Properties 39 (Pty) Ltd v Saratoga Avenue* 2009 (1) SA 470 (W) para 37 hereinafter referred to as *Blue Moonlight Properties case*.

²⁷⁹ *ABSA Bank v Murray case* para 50; issues for delay may include the municipality report on availability of land and alternative accommodation; *Cashbuild (South Africa) (Pty) Ltd v Scott* 2007 1 SA 332 (T) para 42; *Blue Moonlight Properties case* para 78.

²⁸⁰ Is a 'two-way process' whereby the municipalities and the those to be ejected from the premises would negotiate or engaged into meaningful talks in order to arrive at certain objectives; the court ordered meaningful engagement talks in *Occupiers of 51 Olivia road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) Interim order was issued 30 August 2007 hereinafter *Occupiers of 51 Olivia Road case*.

²⁸¹ *Occupiers of 51 Olivia Road case* para 15.

²⁸² Chenwi L and Tissington K *Engaging meaningfully with government on socio-economic rights* (2010) 9.

²⁸³ Delpont (2008) 488.

²⁸⁴ *Ndlovu case* para 153.

²⁸⁵ Delpont (2008) 488.

2.6 Extension of Security of Tenure Act²⁸⁶ (Hereinafter referred to as ESTA)

The ESTA was promulgated to permit protection of an occupier who has permission or one who has been authorised or one who is entitled to occupy the land by the law.²⁸⁷ This is contrary to what the PIE is there to protect. It is crucial to recall that the Act under discussion here applies to those occupying non-urban land or to the tenants occupying land in urban areas but set aside for farming activities.²⁸⁸ ESTA prohibits application of the PIE if the occupier resides on the land in terms of the Act.²⁸⁹ The following are three requirements that must be satisfied for the ESTA to be enforced. The land in question must be in the rural areas and not township land, the occupants must occupy the land with the permission of the owner or the relevant law,²⁹⁰ and the occupier's income must not be above R13 625 monthly.²⁹¹

If the requirements are satisfied, the person occupying the land will be covered by the ESTA and can only be ejected in terms of the same provision.²⁹² The challenge is on how to implement eviction of an occupier whose income is above the one prescribed by the Minister.²⁹³ The PIE cannot be enforced here because it is meant for unlawful occupiers. It is submitted that common law must be implemented in such a scenario, meaning, the person in question is not an 'occupier' in terms of the ESTA and it does not make them an 'unlawful occupier' to satisfy the terms of the PIE.²⁹⁴ Furthermore, Smith argues that another way to deal with the situation is to consider all the occupiers whose lease have been extinguished as unlawful occupiers. If its rural land and other requirements are satisfied, ESTA will be enforced, hence in other cases where the occupier is unlawful, the PIE will be used.²⁹⁵ In other

²⁸⁶ 62 of 1997.

²⁸⁷ S 1 of the ESTA.

²⁸⁸ S 2(1) of the ESTA.

²⁸⁹ Ss 1 and 2 (1) of the ESTA. If the occupiers occupation has been stopped in terms of the provisions of the ESTA even though the occupier is unlawful on the land it means PIE provision will not be applicable; S 2 of PIE. The decision supporting this ruling has been since changed. Reference is being made to *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E) para 767B-C, however the court of law was dealing with implementation of the PIE.

²⁹⁰ S 1(1) of the ESTA. Consent refers to express or tacit consent of the owner who is in control of the land or express or tacit termination of the permission to stay or eviction by holder.

²⁹¹ Regulation GN R1596 Government Gazette 18457 of 28 November 1997. S 1(c) of the ESTA as amended 21 February 2018.

²⁹² S 3(1) of the ESTA, one who has been allowed to stay or use the land may be removed in terms of S 8 of the ESTA.

²⁹³ *Stargrow (Pty) Ltd v Ockhuis and Others* 2018 (1) SA 298 (LCC) para 5: para 59. The income of a the person to be evicted is pertinent; all requirements must be satisfied

²⁹⁴ *Ellis v Viljoen* 2001 4 SA 795 (C); the question was whether apply to such evictions, PIE does not apply.

²⁹⁵ Smith CP (April 2018) ch 4 pg 2.

scenarios if occupation is unlawful the PIE will be applied.²⁹⁶ In other situations, ESTA will be applied to an unlawful occupier who is seeking for restoration.²⁹⁷ Therefore, there must be an opportunity to seek restoration according to the provision of ESTA and one should not be ejected in terms of the PIE.²⁹⁸ On the other hand the PIE may still be implemented even though the land under subject matter may be in rural and PIE will be used in all circumstances especially where the ESTA cannot be used.²⁹⁹

The court alluded that if a person has stayed on land following the provisions of ESTA and later on his stay extinguishes and become unlawful, this person must still be considered as an occupier in line with the ESTA provisions and the ejection must be dealt with in terms of the same provision.³⁰⁰ In the above cited case, the court noted that an occupier such as a widow as defined by the Act, once she became unlawful, she has other rights which permit them to remain at the land.³⁰¹ Hattingh suggests that once the occupation of a widow in terms of ESTA is unlawful, the provisions of the PIE must be invoked.³⁰² Land designated for agriculture or such land in a township recognised in terms of the provisions of ESTA is a vital requirement to consider implementation of ESTA.³⁰³

Finally, it is my view that the RHAA and ESTA have one common negative thing that is, they delay regulation or implementation of the eviction process. Once, it took the court several years to make a decision regarding eviction waiting for the report of a probation officer.³⁰⁴

²⁹⁶ *Agrico Masjinerie (Edms) Bpk v Swiers* 2007 (5) SA 305 (SCA) para 318E-F; hereinafter referred to as *Agrico Masjinerie case*. It was concluded that an occupier who at one time had consent to stay on the land as stipulated in terms of ESTA who wilfully leave the land and occupy it later without permission is an unlawful occupier and PIE must apply.

²⁹⁷ S 14 of the ESTA.

²⁹⁸ *Agrico Masjinerie case* para 320E-H.

²⁹⁹ S 2 PIE; this provision is applicable in the entire land of South Africa; *Agrico Masjinerie case* para 320E-H.

³⁰⁰ *Simonsig Landgoed (Edms) Bpk v Vers and Others* 2007 (5) SA 13 (CPD) para 112F-113H hereinafter referred to as *Simonsig Landgoed case*. The case involved rural and a person to be ejected was a widow who has stayed on the land for a very long time and had been served 12 months' notice in terms of S 8(5) of ESTA; all the requirements of the provision were satisfied.

³⁰¹ *Simonsig Landgoed case* para 112D-113H.

³⁰² Hattingh M "ESTA litigation Reflection on representing occupiers" *ESR Review* Vol 7 no 3 17.

³⁰³ S 2(1) of the ESTA; the Subdivision of Agricultural Land Act 70 Of 1970.

³⁰⁴ *Magubane & another v Twin City Developers (Pty) Ltd & others* (981/16) [2017] ZACSCA 65 (30 May 2017) para 6 hereinafter referred to as *Magubane case*. The probation officer's report was asked for on 27 February 2015, on 20 November 2015 the report was still not submitted. The judge even commented to say it is normal or expected for such reports to take years. Purpose of the report is to consider the effect of eviction on the occupants and their families and to bring other stakeholders such as municipalities to be engaged in the process.

The matter took about four years to be settled.³⁰⁵ However, constitutional rights of those to be evicted are highly prioritised when ESTA is implemented.³⁰⁶

2.7 Conclusion

To sum up, it is clear that the legislature enacted several provisions to regulate or supervise the matters involving the lessor and lessee and adjudicate disputes. It is my view that the RHA and the PIE complement each other without leaving grey areas regarding the matters they resolve but the R13 625 mentioned in ESTA limits the application of PIE. However, the CPA intervenes with the controversial section 14 which shortens the duration of lease to 24 months and excludes longer leases. However, the court stated that there is no requirement 'expressly or implied' that the lessor must be informed clearly that they have 20 business days to correct rent arrears before cancellation of lease.³⁰⁷ The RHA and RHAA introduced the Rental Housing Tribunal to resolve disputes between the lessors and lessees.³⁰⁸ In the appointment of competent personnel,³⁰⁹ it is my view that the legislature had in mind the effectiveness of the structure even though specific qualifications were not outlined for all the personnel to run the Tribunal within the province. However, it is submitted that the Tribunal lacks capacity to enforce its orders or decisions; it can also not hear matters that have to do with evictions.³¹⁰ It is also my view that eviction is an issue that cannot be taken away from the contract of residential lease. On the other hand, the reduction of contract to writing³¹¹ is a major development because in times of disputes, parties will refer to the terms and conditions. The CPA is therefore to fill the gaps of other provisions, though it may not be possible to apply it to the residential lease contract entered into for periods longer than two years. It also prevents discriminatory practice; promote fair and honest dealings with tenants as consumers as well as fair and just lease agreements.³¹² In conclusion, the PIE and ESTA

³⁰⁵ *Magubane case* para 11.

³⁰⁶ *Glen Elgin Trust v Titus & another* [2001] 2 All SA 86 (LCC) para 9; S 9(3) of ESTA; ss 26(1) and (2), 28 (1)(c) and 29(i)(b) of the Constitution.

³⁰⁷ *Transcend Residential Property Fund case* para 56.

³⁰⁸ S 9(1) of RHA as will be amended by the RHAA.

³⁰⁹ S 7 of the RHA.

³¹⁰ S 13(14) as amended by S 6 of 2007 Amendment Act, Tshehla 2016 50.

³¹¹ S 5(6) of RHAA.

³¹² Barnard J (2019) *THRHR* 168.

regarding the residential lease contract are pertinent as they are consulted mostly when one is to implement an eviction procedure.

CHAPTER 3: INEQUALITY, ABUSE OF RIGHTS OF LESSOR AND LESSEE

3.1 Introduction

This chapter seeks to discuss typical 'abuse' or 'unfair practice' exercised by the lessor in a contract of residential lease. The terms 'abuse', 'inequality', 'unfair practice', 'bargaining power or position' will be discussed in relation to a contract of residential lease. The chapter will also endeavour to answer the question of whether a standard contract of residential lease presents unequal bargaining power between the contracting parties. Abuse or unfair practice or inequality will be investigated using the following sub-headings. They are unfair practice; bargaining power; extra charges or tariffs in a contract of residential lease; rent increase or escalation of rent; repayment of security deposit; unlawful locking of premises by lessor; repairs of property or maintenance and compensation of improvements.

3.2 Abuse and unfair practices

'Abuse' refers to the improper conduct of the parties within a contract of residential lease as they discharge their rights and obligations. According to the Merriam-Webster dictionary 'unfair' means 'marked by injustice or partiality'.³¹³ This chapter will endeavour to discuss instances where the lessee is abused by the lessor especially where the landlord have failed to abide by the contract of residential lease or other provisions related to lease. 'Unfair practice' appears to be a common term used in several provisions but may be interpreted differently based on the issue under discussion. Furthermore, 'unfair practice' means any action or failure by the landlord or lessee to comply with the RHA, or a practice listed by regulation as a practice unnecessarily violating the rights or wishes of lessor and lessee.³¹⁴ This definition is comparable in certain respects with 'unfair practice' in the Consumer Affairs (Unfair Business Practices) Act³¹⁵ and other provisions such as the Labour Relations Act,³¹⁶ defined any person who fails to conform to the regulation will be guilty of an offence can be

³¹³ Merriam-Webster Dictionary Since 1828/ www.merriam-webster.com/dictionary/visited (07 February 2019).

³¹⁴ S 1 of the RHA.

³¹⁵ 71 of 1988.

³¹⁶ 66 of 1995, the term used in this Act unfair labour practice, in *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd (Inner City Resources centre as Amicus Curiae)* 2012 (5) BCLR 449 (CC) para 106 hereafter referred to as *Maphango case*.

fined or be imprisoned.³¹⁷ The court in *Maphango case* reached a decision that a ‘practice’ may even include a single act this was decided early under the ‘unfair labour practice jurisdiction in employment law’.³¹⁸

The RHA which governs residential lease contracts lists several deeds that are regarded as unfair practice, constituting an offence by the lessor or lessee.³¹⁹ Some of the conduct analogous to unfair practice are unfair discrimination,³²⁰ failure to put the contract of lease in writing,³²¹ not including the required information in the contract of lease,³²² changing locks without informing the tenant³²³ or unlawfully locking the lessee out of the property³²⁴ and infringement of the right to privacy.³²⁵ Mohamed comments on illegal disconnection of electricity and water supply to the lessee’s room as further examples of unfair practices or abuse of the tenant by the lessor.³²⁶

Smith comments on sections 48 and 49 of the CPA which have provisions regarding to unfair, unreasonable or unjust contract terms’.³²⁷ It is important to note that although most contracts or agreements fall within sections 48 and 49 of the CPA, some may fall outside the ambit of the regulation ‘relating to the presumed unfair, unreasonable or unjust contract terms’.³²⁸ In terms of the regulations, ‘unfair, unreasonable or unjust terms’ are applicable to agreements made by the supplier or the lessor who is doing business to gain profit working ‘wholly or mainly’ for their enterprise or firm with an individual consumer.³²⁹ The implication of the list in regulation 44(1) is that residential leases will be incorporated since the landlord transact or enter into a residential lease contract to gain profit.³³⁰

³¹⁷ S 16(i), imprisonment will not exceed two years.

³¹⁸ *Maphango case* para 57.

³¹⁹ Van Eeden and Barnard (2018) 619.

³²⁰ S 4(1) of the RHA does not permit unfair discrimination.

³²¹ S 5(3) of the RHA.

³²² S 5(3) read with ss 5(7) and (8) of the RHA.

³²³ Mohamed *Tenant and Landlord* (2010) 19.

³²⁴ S 16(hA) of the RHAA.

³²⁵ S 4(2) of the RHA amended or inserted to S 4A(5)-(7) of the RHAA.

³²⁶ Mohamed *Tenant and Landlord* (2010) 19.

³²⁷ Smith CP (April 2018) ch 18 pg 26.

³²⁸ Smith CP (April 2018) ch 18 pg 26.

³²⁹ Regulation 44(1) of the CPA.

³³⁰ Smith CP (April 2018) ch 18 pg 27.

In the *Maphango case*, rent regulation and unfair practice were pertinent issues which were analysed by the court according to De Villiers.³³¹ In this case, the court had to decide whether the termination of the residential lease in order to increase the rent amounted to 'unfair practice'.³³² The lessor raised the rent by over 100 to 150 percent.³³³ The tenants viewed this as abuse of the terms of the contract of residential lease³³⁴ and inconsistent with the public policy. It is my view that this case clearly illustrates the abuse of a contract of lease by the landlord and it also exposes the power imbalance of the parties in this contract of lease.

The tenants in the *Mpange v Sithole*³³⁵ case had to choose between being homeless and paying rent for unsafe accommodation.³³⁶ This case presented a good example of guarding constitutional rights of tenants and fulfilment of section 26 of the Constitution.³³⁷ It is important to point out that the court found the curtailing of the contract of leases as 'unfair practice' in terms of the RHA and the matter was sent back to the Rental Housing Tribunal.³³⁸ Furthermore, Mohamed comments on the RHA that when extinguishing the contract of residential lease, the grounds of termination must not amount to 'unfair practice' and must be noted in the lease.³³⁹ I agree with Christie that generally 'the making (negotiation) of a contract, its terms and enforcement are mostly unfair'.³⁴⁰

³³¹ De Villiers I "Spatial Practices in Lowliebenhof: The case of *Maphango v Aengus Properties (Pty) Ltd*" 2014 PER/PELJ 2165 hereinafter referred to as De Villiers I 2014 PER/PELJ; Maas S "Rental Control : A Comparative Analysis" 2012 PER/PELJ 41/231 hereinafter referred to as Maas 2012 PER/PELJ she also cited several court cases such as *Occupiers, Shulana court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 ALL 54 (SCA) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2011 4 SA 337 (SCA).

³³² S 26(3) of the Constitution provides that no one must be evicted or have their home demolished without a court order. This was contrary to the action by the owner of Lowliebenhof apartments; Stoop P "The law of lease" 2012 *Annual Survey of South African Law* 695.

³³³ *Maphango case* para 88 it was firstly agreed that rent will be raised by 10 percent to 15 percent.

³³⁴ *Maphango case* para 88.

³³⁵ *Mpange v Sithole* 2007 6 SA 578 (W).

³³⁶ Barnard J "Remedies of the lessee: the development of specific performance and reduction in rent: *Mpange v Sithole* 2007 6 SA 578 (W) "2009 (72) THRHR: 345.

³³⁷ De Villiers I 2014 PER/PELJ 2165.

³³⁸ *Maphango case* para 146.

³³⁹ S 4(5)(c) of the RHA.

³⁴⁰ Christie and Bradfield *The law of contract in South Africa* (2011) 12 hereinafter referred to as Christie and Bradfield (2011).

3.3 Bargaining power of the parties in a contract of residential lease (inequality of parties)

According to the well-known words of an English judge:³⁴¹

‘If there is one thing which, more than one another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by courts of justice’.

In this research inequality also refers to unequal or uneven bargaining powers or imbalances between the landlord and the tenant during negotiation of the contract of lease. It is submitted that inequality is similar or close to unfairness in the drafting of contracts.³⁴² Inequality or unequal bargaining power was recognised by our court as one of the other vital factors to consider when establishing if one acted within the public policy.³⁴³ Hutchison says the unequal position between the parties’ result to abuse and unfavourable terms are imposed on the lessee.³⁴⁴ Two questions must be asked to ‘establish fairness’ of the contract that is if there was equal bargaining power between the lessor and lessee; firstly to determine if the terms are unreasonable and if whether the terms can be enforced.³⁴⁵ In some instances the lessor and lessee struggle to have a true honest agreement regarding the terms of contract if a standard-term agreement is used which leaves no opportunity for the lessee to negotiate.³⁴⁶

Sachs J notes that pre-designed or standard form contracts which are now widely used are not a product of negotiation; but have simplified life for the in-house legal practitioner and benefit only the organisation.³⁴⁷ Fritz avers that such a contract indicate the terms by which ‘the supplier is willing to do business’.³⁴⁸ Naudé says the contract will be used on daily basis

³⁴¹ Jessel MR in *Printing & Numerical Registering Company v Sampson* (1875) LR 19 Eq 462 at 465.

³⁴² Fritz M “The Effect of The consumer Protection Act on Contractual Freedom” 2013 LLM UP 9 hereinafter referred to as Fritz 2013 LLM UP.

³⁴³ *Barkhuizen v Napier* (CCT72/05) [2007] ZACC5; 2007 SA (5); 2007 (7) BCLR 691 (CC) (4 April 2007) para 59 hereinafter referred to as *Barkhuizen v Napier case*.

³⁴⁴ Hutchison *et al* (2017) 26.

³⁴⁵ *Barkhuizen v Napier case* para 56.

³⁴⁶ Hutchison *et al* (2017) 25.

³⁴⁷ *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 APRIL 2007) para 137 hereinafter referred to as *Barkhuizen v Napier case*.

³⁴⁸ Fritz 2013 LLM UP 22.

by the enterprise regardless of the needs of the consumer or lessee.³⁴⁹ This process is similar to imposition and has been termed as ‘contract of adhesion’.³⁵⁰ In a court case Lord Reid admitted that standard contracts do not allow the freedom to negotiate a contract; it is either suppliers are not able to read or understand them or if they do understand the terms, they can’t be changed; if they go somewhere else the situation remains the same.³⁵¹ If a contract is drafted in easy or simple language there will be genuine consensus because the consumer would have understood the terms.³⁵² I agree with Hutchison that parties must be permitted to decide the contents of their contract with no external influencing forces.³⁵³

It is important to note that bargaining is analogous to negotiation. The term negotiation is not given a meaning in the CPA and it appears as if consumers has a choice or option.³⁵⁴ Stoop remarks that if a consumer or lessee is presented with several pre-designed options to select from it will not be equivalent to negotiation.³⁵⁵ However, Fritz comments that there is an ‘assumption’ that parties get an opportunity to discuss the terms of the contract.³⁵⁶ The CPA recommends that the supplier must not negotiate in a fashion that is unfair.³⁵⁷

Stoop comments that a weak bargaining position of the lessee and lack of other options ‘imply that the consumer could not have done anything or was not in a good position to protect their interests’.³⁵⁸ Furthermore, Stoop states that a supplier generally has superior bargaining position than the consumer because an individual consumer is ‘usually not in the position to give him leverage’.³⁵⁹ For example, a lessor who is conducting business in an area where there is shortage of houses does not need to negotiate but simply tell the weaker lessee what they have, creating a take or leave it situation.³⁶⁰ It is my view that the government has failed to

³⁴⁹Naudé T “Unfair contract terms legislation: the implication of why we need it for its formulation and application” 2006 (17) *Stell LR* 361.

³⁵⁰ *Barkhuizen v Napier* case para 138.

³⁵¹ *Suisse Atlantique v Rotterdamsche Kolen Central* 1966 2 ALL ER 76

³⁵² *Spennac v Tatrim CC* (216/2013) [2014] ZASCA 48 para 28; Stoop 2015 *PER* 1104.

³⁵³ *Hutchison et al* (2017) 23.

³⁵⁴ Stoop 2015 *PER* 1109.

³⁵⁵ Stoop 2015 *PER* 1109.

³⁵⁶ Fritz 2013 *LLM UP* 8.

³⁵⁷ S 48(1) of the CPA.

³⁵⁸ Stoop 2015 *PER* 1105.

³⁵⁹ Stoop 2015 *PER* 1105.

³⁶⁰ *Barkhuizen v Napier* case para 135; Palanee M “The Role of Unequal Bargaining Power in Challenging the Validity of a Contract in South African Contract Law” 2014 *LLM UKZN* 68 hereinafter referred to as Palanee M 2014 *LLM UKZN*.

satisfy the objectives of the RHA and the Constitution that is to provide adequate housing. However, the Social Housing Act³⁶¹ (SHA) through the Social Housing Policy may or can effectively address the demands of section 26 of the Constitution and supply enough housing units for the low income earners or provide affordable renting premises.³⁶² Hutchison states that when a contract is being drafted social and economic forces influence the parties negotiating.³⁶³

However, Stoop argues that 'inequality of the bargaining position' during negotiation of contract of residential lease cannot be the only factor determining unfairness.³⁶⁴ Fritz asserts that parties setting up a contract have 'less or equal bargaining power' but it appears that parties are simply there to protect their needs.³⁶⁵ Fritz further remarks that 'equality in bargaining powers of the contracting parties is an exception rather than a rule' and unequal negotiating powers has eroded freedom within contracts.³⁶⁶ Stoop comments on section 52(2)(b) of the CPA that the court must consider a number of factors such as 'size of supplier; the relationship of the parties; their capacity; education; complexity and bargaining position' in their proceedings before assessing a transaction where one alleges unfairness.³⁶⁷ Furthermore, the court may test the unfairness of the provisions of the contract of lease.³⁶⁸ As stated in the preamble of the RHA it is there is need of the government to balance the rights of tenants and landlords, ensure protection of the parties' ad eliminate exploitation.³⁶⁹ Various factors or elements contribute to unfairness of a contract, and even though bargaining positions of the parties must be measured, such factors include an assessment to check if the lessee had an opportunity to conclude the same contract elsewhere.³⁷⁰ Again, Stoop remarks regarding the CPA that the court considers the 'individualised' amount that one could have entered into the same contract elsewhere to decide if the residential lease contract would be unfair.³⁷¹ Continued relationship or previous relationship between the

³⁶¹ 12 of 2008 hereinafter referred to as SHA.

³⁶² Van Eeden and Barnard (2018) 605-606.

³⁶³ Hutchison *et al* (2017) 25.

³⁶⁴ Stoop 2015 *PER* 1105.

³⁶⁵ Fritz 2013 *LLM UP* 8.

³⁶⁶ Fritz 2013 *LLM UP* 8.

³⁶⁷ Stoop 2015 *PER* 1105.

³⁶⁸ S 52 of the CPA read together with S 48 of the CPA.

³⁶⁹ Preamble of the RHA 50 Of 1999.

³⁷⁰ Stoop 2015 *PER* 1106.

³⁷¹ S 52(2)(i) of the CPA.

parties may signify that the bargaining position of the lessor and lessee was equal or that the lessee was not exploited.³⁷²

It appears from the above discussion that the introduction of standard forms removed the room of negotiation between the supplier and consumer. On the other hand Fritz comments that the standard form contract comes with several merits such as saving time for the consumer and supplier.³⁷³ Christie says what is presumed as genuine clause will end up being a snare on the consumer who will carry the burden of unfair terms of the contract.³⁷⁴ Fritz observes that consumers rights awarded by the common law or exemption clauses are eroded when consumers are 'left with no other alternative but to submit to the contract' looking only at essential clauses of the contract, for example, if it is a lease contract a consumer may be concerned only about the cost of the rent.³⁷⁵

Furthermore, it is submitted that the inequality of parties negotiating is closely associated to unfairness in the drafting of contracts.³⁷⁶ Van Eeden and Barnard concur that a lessee is not in the same bargaining position with lessor, but they further state that the RHA and CPA may attempt to cure the 'unequal bargaining position which exists between'³⁷⁷ the two regarding contents of the contract under Social Housing Act.³⁷⁸

3.4 Extra tariffs or charges in relation to contract of lease

Landlords who use the same lease for various properties may charge legal fees or administrative fees.³⁷⁹ Van Eeden and Barnard comments that such costs or extra costs in relation to the contract of lease must be paid only by the tenant if the landlord has provided written proof of expenditure.³⁸⁰ Furthermore, Van Eeden and Barnard, in respect of the anticipated RHAA comment that there will be an addition clause stating that a lessee will be

³⁷² Stoop 2015 *PER* 1106.

³⁷³ Fritz 2013 *LLM UP* 23.

³⁷⁴ Christie and Bradfield (2011) 14.

³⁷⁵ Fritz 2013 *LLM UP* 23.

³⁷⁶ Christie and Bradfield (2011) 14.

³⁷⁷ Van Eeden and Barnard (2018) 606.

³⁷⁸ Social Housing Act 16 of 2008 hereinafter referred to as the SHA.

³⁷⁹ Van Eeden and Barnard (2018) 604.

³⁸⁰ S 5(3)(p) of the RHA.

responsible 'for rental and other costs' in terms of a lease agreement but other costs will only be paid by lessee if the landlord has given proof of expenses incurred.³⁸¹

The *Young Ming Shan CC v Chagan NO and Others* illustrate the abuse of a tenant under a lease agreement.³⁸² This was an application to set aside the decision of Gauteng Housing Rental Tribunal (RHT's or Tribunal), where the landlord was levying tenants abnormal electricity charges.³⁸³ The landlord was being charged a service fee of about R337.50 for electricity by City Power for the entire building.³⁸⁴ The same landlord introduced the same amount of charges to about 81 tenants within the premises which ensured that the landlord pocketed about R27 000 surplus versus R337.50 which the landlord was paying to City Power.³⁸⁵ The tenants accused the applicant of 'robbing' them and demanded that such charges be removed.³⁸⁶

In their argument to justify why the landlord had introduced such charges; the landlord claimed it was because of late payers and they believed they were resellers of electricity. They had learnt from that the National Energy Regulator of South Africa (NERSA) regarding 'resale' of electricity in South Africa, and clause 7 of the lease arrangements permit levying extra costs.³⁸⁷ The Tribunal stated that the landlord was harvesting profits which they were not entitled to, and it was against any policy.³⁸⁸ Unfair Regulation Practices were found applicable in this case; it provides that 'in multi-tenanted buildings the landlord may not recover costs collectively' and that a lessor may only recoup expenses of the exact amount for 'consumed services'.³⁸⁹ It is my view that the above paragraph illustrates the exploitation by a lessor of a lessee regarding levying additional costs. In another case the tenant complained of being asked to pay for parking and water charges without their consent (unilaterally imposed charges).³⁹⁰

³⁸¹ S 4A(8) of the RHAA.

³⁸² *Young Ming Shan CC v Chagan NO and Others* 2015 (3) SA 227 hereinafter referred to as *Young Ming Shan Case*.

³⁸³ *Young Ming Shan case* para 1.

³⁸⁴ *Young Ming Shan case* para 10.

³⁸⁵ *Young Ming Shan case* para 12.

³⁸⁶ *Young Ming Shan case* para 10.

³⁸⁷ *Young Ming Shan case* para 14; para 17.

³⁸⁸ *Young Ming Shan case* para 23-24.

³⁸⁹ Regulations 13(1)(e) and 13(1)(f) read with Regulation 13(d).

³⁹⁰ *Transcend Residential Property Fund case* para 15 and 18.

3.5 Rent increase or rent escalation by the landlord

Van Eeden and Barnard point out that the 'rent control' legislation in South Africa has been terminated.³⁹¹ It is submitted that if there is introduction of 'rental control' it may provisionally lift the burden of the shoulders of the tenants, while hindering investment in real estate.³⁹² Van Eeden and Barnard further suggest 'the Minister may introduce housing subsidies to encourage construction of more residential property.'³⁹³ Mohamed mentions that rent increase is expected to be 'reasonable' and the increase must be included in the lease, further mandating the landlord to notify the lessee ahead of time before a rent increase.³⁹⁴ It is submitted that 'the common law position is that the landlord cannot increase the rent' unless if there is a clause permitting such an increase.³⁹⁵

Mohamed comments that the lessor may increase the rent to cater for economic crisis such as inflation.³⁹⁶ It is my view that the major challenge³⁹⁷ is not the landlord increasing the rent, but how they increase the rent since the lessee may be left without an option since it is likely the same everywhere. Maass states that in other countries there are legislations to monitor rent increases.³⁹⁷ Maass further states that the main reason for the regulation of rent is to curtail landlords from constructively ejecting tenants from the property by adding rent.³⁹⁸ I concur with Maass that rent control justifies or 'balance the unequal bargaining power' between the lessor and lessee in the contract of residential lease.³⁹⁹

There is no doubt that low income earners will have no alternative if their contract is to be terminated because of a lack of resources and a good number of the population falls into this category in South Africa.⁴⁰⁰ The state involvement to restrict or monitor rent increase is

³⁹¹ Van Eeden and Barnard (2018) 607.

³⁹² Wille G *et al* *Wille's principles of South African Law* 2007 910, hereinafter *Wille's et al* (2007).

³⁹³ Van Eeden and Barnard (2018) 608.

³⁹⁴ Mohamed *Tenant and Landlord* (2010) 52.

³⁹⁵ Mohamed *Tenant and Landlord* (2010) 52.

³⁹⁶ Mohamed *Tenant and Landlord* (2010) 52.

³⁹⁷ Maass "Rent Control: A Comparative Analysis" 2012 (15) 4 *PER/PELJ* 45, hereinafter referred to as Maass *PER/PELJ* 2012.

³⁹⁸ Maass *PER/PELJ* 2012 45; *Maphango case* para 25.

³⁹⁹ Maass *PER/PELJ* 2012 45.

⁴⁰⁰ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 2 SA 104 (CC) para 1 and 6; *Occupiers, Shulana Court, 11 Hendon road, Yeoville, Johannesburg v Steele* 2010 4 ALL SA 54 (SCA) para 2.

referred to as 'rent control'.⁴⁰¹ However, Maass states that the extent of state participation in rent control is 'uncertain and unavoidable' while it tramples on the rights of the lessor and may cripple private property development.⁴⁰²

Maass highlights that the English have involved themselves in placing limitations to do with 'contractual freedom' and eventually they managed to monitor powers of the landlords and that their system caters for low-income individuals.⁴⁰³ I agree with Maass that besides the consequences South Africa may develop or adopt a better approach to protect the rights of tenants by introducing rent control measures or assist the municipalities to provide affordable rental housing at a large scale, however it must be noted that this is a highly debatable issue.⁴⁰⁴ Van Eeden and Barnard comment on section 3 of the RHA that the lessee may be relieved from high rentals by the introduction of rental subsidy programmes for low income earners.⁴⁰⁵ However, on the other hand Maass comments on Robert Elickson that regulating rent brings a long term uncooperative relationship between lessor and lessee.⁴⁰⁶ It is also imperative that rent control measures must also monitor the duty of the landlord to repair the leased residential property.⁴⁰⁷

3.6 Repayment of security deposit by lessor

It is a common practise that most, if not all landlords require a refundable deposit as security from the tenant before they move into the premises or rented property.⁴⁰⁸ The security deposit is 'an amount of money that the residential tenant pays at the beginning of the lease to offset issues that arise in the future.'⁴⁰⁹ In some instances, landlords request a double

⁴⁰¹ Maass *PER/PEJL* 2012 48.

⁴⁰² Maass *PER/PEJL* 2012 57.

⁴⁰³ Maass *PER/PEJL* 2012 57.

⁴⁰⁴ Maass *PER/PEJL* 2012 81.

⁴⁰⁵ Van Eeden and Barnard (2018) 608.

⁴⁰⁶ Maass *PER/PEJL* 2012 82.

⁴⁰⁷ *Mpange & Others case* para 72-74.

⁴⁰⁸ S 5(3) of the RHA. Insertion of section 4B(1) in terms of RHAA.

⁴⁰⁹ Maletswa and Boshoff "An analysis of the quality of property-management principles in the South African public sector-A focus on residential property" 2015 22 (2) *Acta Structilia* 38 hereinafter referred to as Maletswa and Boshoff *Acta Structilia* 2015.

deposit, for example if the amount of rent is R2000 per month the tenant may be asked to pay a deposit of R4000. The RHA alludes that the deposit may not be above the amount of rent or it can be what the parties have agreed on in their contract.⁴¹⁰

Van Eeden and Barnard comment that the lessor is expected to keep the deposit in an interest bearing account.⁴¹¹ It is my view that if the interest is to be deposited in an interest bearing account it therefore means that the lessor may not request the lessee to increase the deposit when the rent is increased. What measures have been put in place to ensure that all lessors invest the deposit because some of the lease contract they run for several years? Van Eeden and Barnard further comment on section 5(3)(g) of the RHA that the lessee must be paid the interest of the deposit at 'applicable rates of savings account of financial institutes'.⁴¹²

The lessee has a right to ask the landlord in writing for the proof of the interest accumulated by the deposit.⁴¹³ Where the landlord is a member of the Estate Agency the matter must be handled in terms of the Estate Agency Affairs Act.⁴¹⁴ When the lease is extinguished the landlord is permitted to 'apply the deposit and interest gained' to pay for all the outstanding arrears of the lessee including damages or repairs to the property.⁴¹⁵ The remaining amount of the deposit and interest must be given to the lessee within 14 days after they have vacated the premises.⁴¹⁶ If there are no charges for damages or repairs or outstanding arrears on rent the landlord is expected to pay the lessee full amount of deposit and interest earned within 7 days before the contract of lease ends.⁴¹⁷ Glover and Kerr comments on section 51(l)(h) that a contract may not permit a consumer to 'forfeit any money' to the supplier (in this case a lessor) which he is not entitled to by law.⁴¹⁸

Van Eeden and Barnard comments on the RHA that if the tenants fails to attend the joint inspection of premises the landlord may decide depending of the *status quo* to deduct a reasonable amount for repairs or damages or money to replace lost keys from the deposit.⁴¹⁹

⁴¹⁰ S 5(3)(c), S 4B inserted in terms of RHAA, Reg 3(7).

⁴¹¹ Van Eeden and Barnard (2018) 616; Nagel *et al* (2015) 277.

⁴¹² Kopel S (2012) 226; Van Eeden and Barnard (2018) 616.

⁴¹³ S 5(3)(d) of the RHA; Kopel S (2012) 226.

⁴¹⁴ Estate Agency Affairs Act 112 of 1976.

⁴¹⁵ S 5(3)(g) of the RHA, S 4B(1)-(3) of the RHAA.

⁴¹⁶ S 5(3)(g) of the RHA, S 4B(1) -(3) of the RHAA.

⁴¹⁷ S 5(3)(i) of the RHA, S 4B(1)-(3) of the RHAA.

⁴¹⁸ Glover and Kerr (2014) 339.

⁴¹⁹ Van Eeden and Barnard (2018) 616.

Maletswa and Boshoff in their research paper about the Department of Public Works as the lessor pointed out that the department has no capacity to manage the security deposit in an interest bearing account.⁴²⁰ They further stated that the tenants of Department Public Works (DPW) were aware of the deposit but it was paid in the same account for rent, and the managers confirmed that DPW did not act in line with the legislation as far as security deposit is concerned.⁴²¹

Maletswa and Boshoff also indicated that about 50 per cent of the tenants they interviewed were not aware that the security deposit is deposited in an interest bearing account.⁴²² This raises concern because if government official did not educate the public about their rights regarding a security deposit, how much more private sector lessors who are in the business to gain profit? In the *Transcend Residential Property Fund case*, one of the tenants' grievances before the court was that their deposit was not invested in an interest bearing account.⁴²³ Usually, an aggrieved party would lodge a complaint to any rent board, and have an attorney or any authorised agent to claim refund of deposit.⁴²⁴

3.7 Unlawful locking out the lessee and interruption of other services by lessor

The lessor is not permitted to practise self-help; taking the law into their own hands if a lessee has not fulfilled their obligation.⁴²⁵ Van Eeden and Barnard comments that 'under the *mandament van spolie*' a lessor or lessee is prohibited to 'forcibly or wrongfully' take possession of another person's property.⁴²⁶ It is submitted that issues such as 'locking gates or doors or putting chains and locks on the doors or gates'⁴²⁷ or making it difficult for the

⁴²⁰ Maletswa and Boshoff *Acta Structilia* 2015 35.

⁴²¹ Maletswa and Boshoff *Acta Structilia* 2015 35.

⁴²² Maletswa and Boshoff *Acta Structilia* 2015 29.

⁴²³ *Transcend Residential Property Fund case* para 15.

⁴²⁴ S 10 of the Rent Control Act 80 of 1976, invalidated by the RHA.

⁴²⁵ *Nino Bonino v de Lange* 1906 TS 120 para 122.

⁴²⁶ Van Eeden and Barnard (2018) 621; Mohamed *Tenant and Landlord* (2010) 67.

⁴²⁷ Unfair Practices Regulations 3, Gauteng Unfair Practices, reg 9(3).

lessee to gain access into the leased premises amounts to ‘spoliation’ which is abuse of the tenant.⁴²⁸

Stoop noted that in *Darries & Others v City of Johannesburg and Others*⁴²⁹ the occupants of the building argued that it was ‘unlawful and unconstitutional’ for the city authorities to disconnect electricity without complying with the regulations.⁴³⁰ The court found that ‘there is no absolute right for access to power supply or a right to uninterrupted power supply’ if the services provider is not paid.⁴³¹ Stoop further comments on the *Darries & Others case* that disruption of electricity does not amount to denying one the right to adequate housing or right to water which are fundamental rights.⁴³² It is my view that if a landlord has failed to pay for the utilities may not alert or inform the tenants, and the city authorities may not notify the tenants about arrears of a property owner but they may simply cancel the services.

The tenants may not contract with the municipality to challenge the disconnection of services, for example were the landlord provide the services such as water and they are the one paying the municipality directly; it is therefore clear that the contract is between the landowner and municipality regarding that particular service in the given scenario.⁴³³ Changing of locks must be done after giving a reasonable notice to the lessee.⁴³⁴ Van Eeden and Barnard highlights that section 16(hA) of the RHA alludes that any person who without permission of the court locks a residential home will be found guilty and ‘liable on conviction to a fine or imprisonment not exceeding two years or both such fines’.⁴³⁵ It is my view that the legislator included the above mentioned section in the provision to protect a lessee when a lessor resorts to self-help. The aggrieved lessee may approach the court for a remedy or for the court to order that the spoliation be stopped.⁴³⁶

⁴²⁸ *Gauteng Provincial Driving School Association and Others v Amaryllis Investment (Pty) Ltd and Another* [2012] 1 ALL SA 290 (SCA) para 1-2, hereinafter referred to as *Gauteng Provincial Driving School case*.

⁴²⁹ *Darries & Others v City of Johannesburg and Others* 2009 (5) SA 284 (GSJ) hereinafter referred to as *Darries & Others case*.

⁴³⁰ Stoop P “The law of lease” 2009 *Annual Survey of South African Law* 866 hereinafter referred to as Stoop “The law of lease” 2009.

⁴³¹ *Darries & Others v City of Johannesburg and Others* 2009 (5) SA 284 (GSJ) para 297A-B.

⁴³² Stoop “The law of lease” 2009 868.

⁴³³ Stoop “The law of lease” 2009 866.

⁴³⁴ *Gauteng Unfair Practices*, reg 9(4), *Free State Unfair Practices*, reg 3.

⁴³⁵ Van Eeden and Barnard (2018) 621.

⁴³⁶ *Mohamed Tenant and Landlord* (2010) 67; Van Eeden and Barnard (2018) 621.

The tenants in *Darries & Others* made necessary arrangements to restore the services.⁴³⁷ Therefore, the action of the City Power to cut electricity was meant to get the attention of the landlord but it had detrimental effects on the tenants who were left without electricity.⁴³⁸ However, in another court decision it was noted that it is the mandate of the municipality to render the services of water and electricity to the public and the public must not be deprived of such; it was therefore held that in such circumstances the municipality take proper measures to notify the tenants, for example by displaying a notice for a period of about 14 days at the premises.⁴³⁹ Stoop comments that the case curtails disruption of services by municipalities without notifying the tenants and that municipalities will no longer use by-laws as an excuse to terminate services.⁴⁴⁰ On the other hand Stoop recognizes that the municipality now has a mandate to establish if the premises are being used by the tenants or the landlord; and such landlords who do not pay bills to the municipality may still ‘escape the effect of remedies available to their tenants’.⁴⁴¹

3.8 Duty of lessor to maintain the property in condition agreed upon

Cooper comments that the lessor has an obligation to maintain or repair the leased residential home or any other ‘defective essential parts’ of the premises during the duration of the lease.⁴⁴² The damaged parts of the premises must be substituted with new ones.⁴⁴³ The lessor must ensure that the residential premises being leased are ‘wind and water-tight’.⁴⁴⁴ Reed and Lehmann comments that in *The Treasure Chest v Tambuti Enterprise (Pty) Ltd*⁴⁴⁵ the lessor leased a shop and when it rains pools of water formed in the shop making it very difficult to trade or display goods.⁴⁴⁶ Cooper remarks that the lessor must make an effort to

⁴³⁷ *Darries & Others case* para 297E.

⁴³⁸ *Darries & Others case* para 300B-C.

⁴³⁹ *Mkontwana v Nelson Mandela Metropolitan Municipality & another: Bissett & others v Buffalo City Municipality & others: Transfer Rights Action Campaign & others v MEC, Local Government and Housing Gauteng, & others (KwaZulu Natal Law Society and Msunduzi Municipality as amici curae)* 2005 (1) SA 530 (CC) para 38; 43; 47.

⁴⁴⁰ Stoop “The law of lease” 2009 870.

⁴⁴¹ Stoop “The law of lease” 2009 871.

⁴⁴² Cooper WE *The Landlord and Tenant* (1994) 98-99 hereinafter referred to as Cooper WE (1994).

⁴⁴³ *African Theatres Trust v Est McCubbin* 1919 NPD 277 para 280.

⁴⁴⁴ Van Leeuwen Cens For 1.4.22.10.

⁴⁴⁵ *The Treasure Chest v Tambuti Enterprise (Pty) Ltd* 1976 (2) SA 738 (A).

⁴⁴⁶ Reed DC and Lehmann K *Basic Principles of Business Law* (2010) 256 hereinafter referred to as Reed and Lehmann (2010).

inquire or ascertain the extent of the repairs needed at the premises.⁴⁴⁷ The lessor has no obligation to repair the premises damaged by the lessee due to his negligence.⁴⁴⁸ It is my view that the lessee is left in the cold when they call the lessor to implement repairs if lessor does not respond in time. This is possible were the lessor is not the property owner and the repairs needed may be too expensive or the premises have not been receiving attention for a very long time.

Naudé analysed the effect of *Mpange & Others v Sithole*,⁴⁴⁹ one of the initial reported decision to permit 'specific performance for the lessor's obligation' to institute repairs on the leased rented property.⁴⁵⁰ The reason why the court could not order specific performance for the lessor to carry out repairs or maintain the premises is because they lacked the capacity to monitor implementation of their decision.⁴⁵¹ Naudé notes that this decision was not upheld in the court decision that followed; which 'emphasised that the contracting party in principle' has a right to specific performance.⁴⁵² The remedy to request for specific performance had fallen out of favour in England and as was noted in *Mpange case & others*.⁴⁵³

In addition, Naudé notes that there was no provision prohibiting our courts to order specific performance.⁴⁵⁴ Naudé assumes that another reason why courts were not issuing an order for specific performance could be because the lessee could carry out 'repairs himself after unsuccessful demand and later claim'.⁴⁵⁵ It is submitted that this cannot be tolerated or viewed as an alternative solution where the 'lessees were poor and lacked skills' needed to do such essential repairs.⁴⁵⁶ The environment of the premises under discussion were so dilapidated and would require enormous funds to repair.⁴⁵⁷ The condition were so bad that the lessee was faced with 'homelessness or to stay in an unsafe environment, which reduced their right to privacy and hindered their dignity as well as encroached their right to enough

⁴⁴⁷ Cooper WE (1994) 99.

⁴⁴⁸ Cooper WE (1994) 99.

⁴⁴⁹ *Mpange & Others v Sithole* 2007 (6) SA 578 (W) hereinafter referred to as *Mpange & Others case*.

⁴⁵⁰ Naudé T "The Law of Lease" 2010 *Annual Survey of South African Law* 872 hereinafter referred to as Naudé "The Law of Lease" 2010.

⁴⁵¹ *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd* 1953 (1) SA 246 (W) para 249G-H.

⁴⁵² Naudé "The Law of Lease" 2010 872; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A); *Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A).

⁴⁵³ *Mpange & Others case* para 41-44; Cooper WE (1994) 89.

⁴⁵⁴ Naudé "The Law of Lease" 2010 872.

⁴⁵⁵ Naudé "The Law of Lease" 2010 872.

⁴⁵⁶ *Mpange & Others case* para 37.

⁴⁵⁷ Naudé "The Law of Lease" 2010 873.

housing'.⁴⁵⁸ Sadly the court could not order specific performance because the lessor was not the owner of the premises; the order which was being sought was going to affect the interests of the owner.⁴⁵⁹

The court ordered that the rent which was R420 per month for a room be minimized to R170 for a room per month.⁴⁶⁰ Naudé comments that other court decisions which announced that the lessee is obligated to pay full rent while they have full occupation and enjoyment of the premises was dismissed citing that they were based on a wrong interpretation.⁴⁶¹ Our courts are of the view that such an order will motivate the lessor to take an initiative and repair the premises in order to collect the full rent while on the other hand the lessee may better their current *status quo* with the funds saved.⁴⁶² It is my view that it appears to be a fair decision to reduce rent in order to motivate the lessor to make an effort to repair the premises, while on the other hand it must not be forgotten that the lessee may still be exposed to high risks because of the unsafe conditions of the premises.

3.9 Compensation for improvements made by lessee during the lease

Nagel *et al* and Cooper suggest that if the lessee is to make some improvements to the rented property with the permission of the lessor, the lessee has a right to be compensated.⁴⁶³ Theart defines improvements as 'reconstruction of whole or part' of the residential property which will make the property to appreciate in value.⁴⁶⁴ Nagel *et al* comments that the problem emanates if the lessee carried out improvements attached to the property without authorisation or an agreement with the landlord.⁴⁶⁵ In such circumstances in Holland Placaat of 1658 was used to regulate and the document was re-introduced in 1696.⁴⁶⁶ Cooper comments that before 1658 according to the Roman-Dutch Law, a tenant was at par with a

⁴⁵⁸ *Mpange & Others case* para 46- 48.

⁴⁵⁹ *Mpange & Others case* para 60-63.

⁴⁶⁰ *Mpange & Others case* para 87.

⁴⁶¹ Naudé "The Law of Lease" 2010 873. *Anorid v Viljoen* 1954 (3) SA 322 (C)'s decision was rejected.

⁴⁶² *Mpange & Others case* para 72-74.

⁴⁶³ Nagel *et al* (2015) 270; Cooper WE (1994) 332; Visser *et al Gibson south African Mercantile & Company Law* 2003 189 hereinafter referred to as Visser *et al* (2003).

⁴⁶⁴ Theart R "Leasehold improvements: developing a framework for tax deductions applicable to lessees" 2014 M Com Tax UP hereinafter referred to as Theart 2014 UP.

⁴⁶⁵ Nagel *et al* (2015) 270.

⁴⁶⁶ Nagel *et al* (2015) 270.

bona fide possessor as far as compensation was concerned and taking away of improvements done during lease; this position changed in 1696.⁴⁶⁷ There was much controversy in South Africa as to what the position is regarding the implementation of Placaat of 1696.⁴⁶⁸

Until 2006 South African courts were unsure if the Placaat was for ‘both rural and urban tenements’; during this period lessees were permitted to remove all attachments as long as it does not change the status of the property.⁴⁶⁹ Later on courts held contrary decisions. Cooper noted that after the extinguishment of the lease the owner of the premises becomes the owner of those attachments that the lessee failed to remove.⁴⁷⁰ Cooper further comments that courts alerts us that the lessee may not gain access to the premises to detach improvements he made during the lease.⁴⁷¹

The lessee is permitted to claim for improvements made during lease upon termination of the lease and only after the lessee has left the premises.⁴⁷² The claim is made to the owner of premises; the claim is not based on ‘use or value a structure or material is to the lessor’.⁴⁷³ Nagel *et al* states that in terms of South African law the lessee ‘has a claim on the basis of unjustified enrichment for improvements made as well as the attachments done with authorisation.’⁴⁷⁴ It is submitted that essential costs can be claimed while for useful improvements their ‘increase in market value’ or similar expenses can be claimed.⁴⁷⁵ Cooper describes the argument brought by the courts that the lessor must select whether to pay for the improvements or ask the lessee to detach such improvements as “unsound”.⁴⁷⁶

⁴⁶⁷ Cooper WE (1994) 328; Visser *et al* (2003) 190.

⁴⁶⁸ Nagel *et al* (2015) 270.

⁴⁶⁹ *Burrows v McEnvoy* 1921 CPD 299 para 325.

⁴⁷⁰ Cooper WE (1994) 332.

⁴⁷¹ Cooper WE (1994) 332.

⁴⁷² *Oosthuisen v Est Oosthuisen* 1903 TS 688 para 692; *Lechoana v Cloete* 1925 AD 409 para 406.

⁴⁷³ Cooper WE (1994) 333.

⁴⁷⁴ Nagel *et al* (2015) 270; Visser *et al* (2003) 190.

⁴⁷⁵ Nagel *et al* (2015) 270; Visser *et al* (2003) 190.

⁴⁷⁶ Cooper WE (1994) 333.

3.10 Conclusion

In conclusion, I agree with Christie's argument that the 'the making of a contract, its terms and enforcement are mostly unfair'.⁴⁷⁷ It is my view that although South African courts consider several factors in determining whether there was unequal bargaining power, it appears to me that lessees enter into these contracts because there are no or little options available for them. While on the other hand if the court establishes that there was 'unequal bargaining power' between the lessor and lessee it will come to a conclusion that the contract is unfair.⁴⁷⁸ The use of pre-drafted, standard contracts does not give the lessee an opportunity to negotiate the terms at all, as they usually just read and sign.⁴⁷⁹

Furthermore, although the lessee is given a notice period before a rent increase, many are unable to afford such increase, leaving them to either accept and continue with the contract or to give a notice for termination because they cannot afford the increase in rent. I agree with Maass that South Africa must introduce rent control measure to protect the lessee.⁴⁸⁰ However, Van Eeden and Barnard concur to the idea of rent control, but they cite it as a 'short-term relief to the lessee' because it has a negative effect on investment.⁴⁸¹ I also agree with Maletswa and Boshoff that in some instances the security deposit is abused by the landlord.⁴⁸²

Additionally, a lessee can be involved in the dispute between the property owner and the municipality if the landlord has failed to pay for the services.⁴⁸³ Extra tariffs or charges such as parking, water and electricity which are outside the residential lease contract where the premises have no meters for units exposes the lessee or tenants to exorbitant bills.⁴⁸⁴ I support the development of the idea of awarding the lessee a specific performance order, however each residential lease contract has its own complexities; for example, where property owner is not the landlord and the municipalities are service provider and they may

⁴⁷⁷ Christie and Bradfield (2011) 12.

⁴⁷⁸ Stoop 2015 *PER* 1105.

⁴⁷⁹ Fritz 2013 *LLM UP* 9.

⁴⁸⁰ Maass *PER/PEJL* 2012 81.

⁴⁸¹ Van Eeden and Barnard (2018) 608.

⁴⁸² Maletswa and Boshoff *Acta Structilia* 2015 35.

⁴⁸³ *Darries & Others case* para 300B-C.

⁴⁸⁴ *Young Ming Shan case* para 12.

not have a contract with lessee.⁴⁸⁵ It is also my view that more awareness need to be raised regarding the right of the lessees to have their security deposit put in an interest bearing account as very few lessees are aware that a security deposit is supposed to accumulate interest.

⁴⁸⁵ *Mpange & Others case* para 60-63.

CHAPTER 4: CONCLUSION

To reflect on the research questions of this analysis; namely; What are the protective measures in legislation to guard against abuse and inequalities? Are the current regulations, supervisory measures, system or structures of the contract of lease sufficient in addressing the problems between lessor and the lessee? It is clear that South Africa came up with various provisions to guard against the abuse of power and inequalities; to supervise the contract of residential lease. They are the RHA⁴⁸⁶; the RHAA⁴⁸⁷; the CPA⁴⁸⁸; the PIE⁴⁸⁹; the ESTA⁴⁹⁰; the Social Housing Act⁴⁹¹ and the Constitution⁴⁹² of the Republic of South Africa. It is my view that the promulgation of all these provisions was to endeavour to simplify the complexities (reduce problems) in the relationship between the lessor and lessee. The shortcomings of the RHA will be complemented once the RHAA is implemented into law.⁴⁹³ It is my view that the provisions established complement each other to address the rift and needs of the lessor and lessee within each system. Therefore, it is also my thought that South Africa maintains the idea of fragmented or multi-legislation to supervise the contract of residential lease and minimise inequalities, unequal bargaining powers, and reduce conflict between lessor and lessee. The provisions will continue to complement each other.

The RHA established the RHTs to ensure that there is ‘recourse’ between the lessor and lessee.⁴⁹⁴ However to ensure effective supervision I recommend that South Africa may provide enough resources to municipalities and personnel to adopt the enforcement of the Rental Housing Act where local authorities supervise the conditions of the premises to identify dangers or risks to occupants this will help in several cases whereby lessors enjoy to collect rent and abandon their duty to maintain the premises. I agree with Mohamed when he commented on *Maphango & Others case* that ‘despite lacking enforcement of its order’ the RHT’s are still ‘generous and powerful mechanism’ that which is still going some transformation through the amendments and the alterations will bring more ‘protection’ to the South African tenant.⁴⁹⁵ The RHTs is one of the institution added by the legislator to provide protective measures and to terminate disputes between the lessor and lessee.

With regard to supervision of rent increase. I concur with Mohamed that South African courts have sided with the landlord because in some instances the rent increase it is very high as was

⁴⁸⁶ 50 of 1999.

⁴⁸⁷ 35 of 2014.

⁴⁸⁸ 68 Of 2008.

⁴⁸⁹ 19 of 1998.

⁴⁹⁰ 62 of 1997.

⁴⁹¹ Social Housing Act 16 of 2008 hereinafter referred to as SHA.

⁴⁹² The Constitution, 1996.

⁴⁹³ Laubscher 2016 *NWU* 173.

⁴⁹⁴ Mohamed *The Tenant and Landlord* (2010) 2.

⁴⁹⁵ Mohamed “RHT’s “exclusive” jurisdiction over unfair practice” June 2016 *LexisNexis Property Law Digest* 9 hereinafter referred to as Mohamed June16 (3) *LexisNexis Property Law Digest*.

noted in *Maphango & Others case*; the increase was between 100 and 150 percent.⁴⁹⁶ It is submitted that our courts must curtail such abusive character of landlords who are fond of exploiting the tenants.⁴⁹⁷ I recommend that the landlord and tenant can approach the tribunal who must be empowered to determine 'reasonable' rent and once it is set by the tribunal the tribunal cannot hear such a matter within two years. Furthermore, it can also be a criminal offence to charge more than the agreed rent. Besides failure to control rent increase I second De Villiers strongly that South Africa has taken measures to preserve vulnerability of the tenant by enacting the RHA and through section 26 of the Constitution to prevent some form of abuse especially eviction without court order amounts to unfair practice.⁴⁹⁸ I agree with Maass who suggest that shortage of housing in South Africa is enough exhibit why rent should be controlled; to eliminate exploitative nature of lessors and try to balance the bargaining powers of the parties in the contract of residential lease.⁴⁹⁹ It is therefore clear that our legislation neglected or abandoned the rent regulation or supervision and left the tenant vulnerable to lessors who seek to accumulate enormous profits. It must be remembered that rent was regulated before the introduction of the RHA. I agree with Maass who recommends that the state must 'interfere in private rental market' to give protection to tenants especially those with low salaries.⁵⁰⁰ I recommend that South Africa may also introduce the system of creating 'fair rents' which are ascertained by set tribunal officer for the private property market which is fair to allow the industry to grow and at the same time not burdening the lessee with high rent.

Regarding the termination of contract of residential lease Tshehla comments that the RHA prohibits the RHT's to hear matters regarding termination of lease.⁵⁰¹ Mohamed referred to RHT's as a structure without 'teeth' they cannot enforce its rulings, or force witnesses to appear before it, 'compel parties to appear before it', again if parties decides to ignore summons 'there is no recourse'.⁵⁰² I agree with Mohamed and Tshehla who recommends that the powers of RHT's can be extended to allow 'attachments, interdicts and spoliation orders', hear matters of evictions and authorise the sheriff to enforce its decisions and power 'to evict in order to be able to protect the lessee'.⁵⁰³

⁴⁹⁶ Mohamed June16 (3) *LexisNexis Property Law Digest* 11.

⁴⁹⁷ Mohamed June 16 (3) *LexisNexis Property Law Digest* 11.

⁴⁹⁸ De Villiers I 2014 *PER/PELJ* 2165-2169.

⁴⁹⁹ Maass 2012 *PER/PELJ* 56.

⁵⁰⁰ Maass 2012 *PER/PELJ* 58.

⁵⁰¹ Tshehla 2016 42.

⁵⁰² Mohamed "Enforcement of Rental Housing Tribunals Orders" June 2008. *LexisNexis Property Law Digest* 12 (2) 3.

⁵⁰³ Tshehla 2016 51; Mohamed "Enforcement of Rental Housing Tribunals Orders" June 2008. *LexisNexis Property Law Digest* 12 (2) 3.

Furthermore, security deposit in terms of South African legislation is to be deposited into an interest bearing account by the landlord.⁵⁰⁴ The lessee has a right to request and be informed about the money accumulated by the security deposit.⁵⁰⁵ It is my suggestion that the consequences of failure to refund the deposit by the landlord at the end of lease period must be 'severe' in South African law. For example the RHA may make it a criminal offence or the landlord must then be requested to refund the security deposit equal to at least four times. However, duration of the lease must be considered in deciding amount to be refunded. Therefore, it is encouraged or recommended that the RHAA be adopted and be implemented to prevent the landlords from running away with the deposit of the lessee; it will also ensure effective supervision. Maletswa and Boshoff states that in their survey about 53 percent of the tenants were not aware that the security deposit is invested in an interest earning account.⁵⁰⁶ Therefore it is my view that majority of the tenants may even fail to claim their deposits on expiry of lease or they claim a portion of it since they don't know about interest accumulation. I suggest that the RHT's engage or conduct extensive education programmes to educate the lessee about their rights. With view of the above paragraph it is my view that there has to be close supervision of lessors to ensure all the contracts under them; that the security deposit is invested in an account which earn interest and it is with no doubt that the lessee is not aware of their rights and hence left vulnerable to abuse by lessor.

Furthermore, to establish if the contract of residential lease is reeked with abuse of unequal bargaining power between the contracting parties; various issues were exposed. Van Eeden and Barnard comments on the RHA that the landlord has an obligation to 'keep and maintain the dwelling in accordance with regulations or any other law.'⁵⁰⁷ This is contrary to the results found in Maletswa and Boshoff survey paper were about 69 percent of the tenants interviewed disagreed that their premises were not properly maintained or repaired by the lessor.⁵⁰⁸ Repair extends to the making available of the equipment or facilities of removal of garbage, ashes, repair of general 'wear-and-tear', plumbing, keeping the garden clean, ensuring good ventilation, repair of lights, stoves, handles, locks.⁵⁰⁹ As was noted before sometimes the lessee is exposed to an unsafe environment and homelessness due to failure by the landlord to keep the premises in good shape.⁵¹⁰ I support the decision taken by our courts of rent reduction or specific performance to influence the landlord to repair the premises.⁵¹¹

⁵⁰⁴ S 5(3) of the RHA.

⁵⁰⁵ S 5(3)(d) of the RHA; Kopel S (2012) 226.

⁵⁰⁶ Maletswa and Boshoff *Acta Structilia* 2015 29.

⁵⁰⁷ Van Eeden and Barnard (2018) 628.

⁵⁰⁸ Maletswa and Boshoff *Acta Structilia* 2015 30.

⁵⁰⁹ Gauteng Unfair Practices, reg 7(1)(d)-(i),

⁵¹⁰ *Mpange & Others case* para 46-48.

⁵¹¹ *Mpange & Others case* para 72-74.

I concur with Fritz, Hutchison and Stoop that the use of pre-drafted contracts leaves the lessee vulnerable and with no power to negotiate the contract of residential lease.⁵¹² Van Eeden and Barnard comment on Viljoen work; concurring that tenants are not at the same negotiating level (unequal bargaining power) with the landlord.⁵¹³ I agree with view of Van Eeden and Barnard that the RHA must be 'read together' with the CPA and it could solve the 'unequal bargaining position between parties' as well issues that are not clear under the SHA.⁵¹⁴ While Stoop; Fritz and Hutchison agree on the other hand that it is still problematic because our courts take various factors into consideration to ascertain and conclude that the contract is indeed unfair.⁵¹⁵ Mohamed states that the South African courts are not willing to be involved in the relationship of the parties especially where one is questioning 'reasonableness or good faith or fairness of the lease contract'.⁵¹⁶ It is submitted that the inequality of negotiating power exists in the making of residential lease contracts between the lessor and lessee.⁵¹⁷

It is my view that to eradicate unfair extra charges by the lessor the local authorities' officials may closely monitor all premises that they have meters for water and electricity for each unit; or it can be a requirement that for premises to be leased units must have water and electricity meters. The landlord expose lessee's to abnormal extra costs.⁵¹⁸ However, installation of meters may not fully alleviate the lessee from being exposed to high charges by lessor because if the building has one single meter for all the tenants dividing the actual costs among the lessees is still not fair because the units themselves may not be the same; number of people in each unit may differ as well as consumption or use of services. It must be noted that disputes regarding the quantum of such charges are popular even those renting local authorities or state premises and it's not easy to eradicate them.

I concur with Laubscher that section 14 of the CPA seems to be problematic because it brings a number of limitations to the regulation of residential lease contracts such as reducing the duration of lease to 24 months.⁵¹⁹ Laubscher recommends that section 14 of the CPA be removed from the regulation of immovable property, this will delete 'uncertainties and unwanted implications brought by the use of section 14 of the CPA to fixed lease contracts of residential lease'.⁵²⁰ However, it is submitted that the introduction of the CPA ushered in a new dimension of 'compliance' in terms of construction of the contract of residential lease

⁵¹² Fritz 2013 *LLM UP* 22; Hutchison *et al* (2017)22; Stoop 2015 *PER* 1104.

⁵¹³ Van Eeden and Barnard (2018) 606.

⁵¹⁴ Van Eeden and Barnard (2018) 606.

⁵¹⁵ Fritz 2013 *LLM UP* 20-24; Hutchison *et al* (2017)22; Stoop 2015 *PER* 1105-1107.

⁵¹⁶ Mohamed June16 (3) *LexisNexis Property Law Digest* 11.

⁵¹⁷ Fritz 2013 *LLM UP* 22-23.

⁵¹⁸ *Young Ming Shan case* para 1.

⁵¹⁹ Laubscher 2016 *NWU* 175.

⁵²⁰ Laubscher 2016 *NWU* 175.

for example language needs and fair contract terms and conditions and notice period.⁵²¹ It is with no doubt that the CPA preserves or 'escalates' the rights of the tenants to a greater extend for example the 'right to privacy'.⁵²² Furthermore, our courts took a different direction in interpretation of who is a 'consumer' in terms of the CPA.⁵²³ Therefore, consumer includes also an 'occupant' who is a beneficiary in terms of CPA.⁵²⁴ There is no requirement by the landlord which states that the consumer must be notified expressly that they have 20 business days to pay arrears of rent before the cancellation of the lease agreement.⁵²⁵ However, the landlord must evict the tenant who is now an unlawful occupier in term of the PIE.⁵²⁶

Finally, based on the discussion in chapters above and in this section it is evident that the contract of residential lease in South Africa is reeked with abuse of unequal bargaining power between the lessor and lessee. It looks like the lessor will dominate for a longer period until such a time our courts will not be using several factors to determine abuse or unequal bargaining position. However, South African law system has put several measures in place in an attempt to supervise and protect the rights of lessor and lessee in the contract of residential lease. Several pieces of legislation have been promulgated with the view of ensuring sufficient supervision. These legislations they supplement each other example section 14 of the CPA can be used by a landlord on a problematic tenant who used to wait to pay rent on the 19th day and eviction order will be envisaged in terms of the PIE. It is my wish that the RHAA will be adopted with speed to ensure maximum protection to the lessee. It is my view that sufficient supervision will arise if the RHT's are given further powers suggested above. Unfair practice or abuse and not enough supervision is evident in some instances involving extra tariffs or charges, repairs or maintenance as well as investment of security deposit. It is my view that supervision can be effective if there is some form of monitoring like inspectors on the ground especially on checking unhabitable conditions.

⁵²¹ Stenekamp "The Impact of the Consumer Protection act 68 Of 2008 and related legislation on typical lease agreements" 2012 UP 188.

⁵²² Stenekamp "The Impact of the Consumer Protection act 68 Of 2008 and related legislation on typical lease agreements" 2012 UP 188.

⁵²³ *Transcend Residential Property Fund case* para 33-36 and 38.

⁵²⁴ S 14(2)(c) of the CPA.

⁵²⁵ *Transcend Residential Property Fund case* para 56.

⁵²⁶ S 4(6) or S 4(7) of the PIE.

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